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No. 10-___

IN THE

Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC., AND MINE RECLAMATION CORPORATION,

Petitioners,

v.

NATIONAL PARKS & CONSERVATION ASSOCIATION ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a court err by vacating an agency's action and remanding for further administrative proceedings that will have no effect on the agency's decision or serve any other substantive purpose?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption, the following were parties in the court of appeals:

Donna Charpied; Laurence Charpied; Desert Protection Society; Center for Community Action and Environmental Justice; Bureau of Land Management; United States Department of Interior; National Park Service; Bruce Babbitt, in his official capacity as Secretary of the Interior; Tom Fry, in his official capacity as Acting Director of the Bureau of Land Management; Al Wright, in his official capacity as Acting California State Director of the Bureau of Land Management; Tim Salt, in his official capacity as Bureau of Land Management California Desert District Manager; Robert Stanton, in his official capacity as Director of the National Park Service.

RULE 29.6 STATEMENT

Kaiser Eagle Mountain, LLC (formerly Kaiser Eagle Mountain, Inc.) is a wholly owned subsidiary of Kaiser Ventures LLC.

Kaiser Ventures LLC and Itel Container Ventures, Inc. each own more than 10 percent of Mine Reclamation, LLC (formerly Mine Reclamation Corp.).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Kaiser Eagle Mountain, Inc., and Mine Reclamation Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. A) is published at 606 F.3d 1058. The district court's opinion (Pet. App. B) is unpublished.

JURISDICTION

The court of appeals denied petitioners' timely petition for rehearing and suggestion of rehearing en banc on July 30, 2010. Pet. App. F. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutes and regulations relevant to this petition are reproduced in the appendix (Pet. App. G).

STATEMENT OF THE CASE

This case arises from an approved and completed land exchange between petitioners Kaiser Eagle Mountain, Inc., and Mine Reclamation Corporation (collectively, "petitioner" or "Kaiser") and the United States. The exchange is the final legal prerequisite to the construction of what will be the nation's largest landfill. The project has undergone two decades of review, including the development and publication of a 1600-page Environmental Impact Statement (EIS), and has thus far cost $80 million.

The Ninth Circuit unanimously upheld the agency's determination that the land exchange satisfies the standard specified by Congress: that it will "well serve[]" the "public interest," 43 U.S.C. § 1716(a), including by producing significant environmental benefits.

But by a divided vote, the court (per Pregerson, J.) proceeded to vacate the agency's approval of the land exchange and remand the case to BLM. A lengthy dissent argued that the majority's ruling amounted to "blind form over substance," triggering significant administrative proceedings and inevitable appeals that lack any purpose, given that the agency on remand inevitably will reaffirm the land exchange. Pet. App. 96 (Trott, J., dissenting).

1. The Federal Land and Policy Management Act (Management Act) authorizes an exchange of federal and private property if the Secretary of the Interior "determines that the public interest will be well served by making that exchange." 43 U.S.C. § 1716(a). BLM appraises the property so that "the values [can] be equalized by the payment of money." *Id.* § 1716(b). The appraisal accounts for the property's "highest and best use," which is not necessarily the use proposed by the exchanging party but instead is the "most probable legal use." 43 C.F.R. § 2200.0-5; *see also* 43 C.F.R. § 2200.0-6.

Because the National Environmental Policy Act (NEPA) requires federal agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(c), BLM must produce an EIS for a land exchange, 43 C.F.R. § 2200.0-6(a); *see* 42 U.S.C. § 4371. The EIS process compels no substantive

outcome. Instead, it requires the agency to take a "hard look" at the consequences of its environmentally significant actions and their viable alternatives. Among other requirements, the EIS must "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. When an agency "is responding" to a private proposal, it is required to discuss the private purposes motivating the project. *E.g.*, *Colo. Envt'l Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

2. Petitioner Kaiser Eagle Mountain, Inc. (Kaiser) owns an iron ore mine in Riverside County, California. Beginning in 1989, Kaiser sought to convert some of the site – which contains massive excavation pits surrounded by unreclaimed mining wastes – into a landfill to contain safely more than 700 million tons of non-hazardous waste to be collected from several Southern California counties over more than fifty years. Most of the waste would travel by train, arriving on the rail lines that previously conveyed iron ore away.

To implement the project, Kaiser had to acquire certain federal land for which it already held mining rights. Pursuant to the Management Act, BLM gave Kaiser that land in exchange for other valuable natural habitat that Kaiser owned and a payment by Kaiser to cover the difference in the properties' value. As explained by the United States, the "private lands that Kaiser offered for the exchange" would "consolidate public landholdings" in "an area designated by the United States Fish and Wildlife

Service as critical habitat for the desert tortoise," whereas the "federal lands selected for the exchange are generally fragmented parcels that encircle the former mining pits." U.S. C.A. Br. 6.

BLM and Riverside County (the lead state agency responsible for reviewing the project) jointly undertook a massive, multi-year environmental review under NEPA and the California Environmental Quality Act (CEQA). The expert Technical Advisory Panel commissioned to study the project ultimately found that

> the designers have done essentially all that is humanly possible to make this a safe landfill that will be protective of . . . the underlying and surrounding environment. Given the favorable site conditions, sophisticated waste management systems, and elaborate monitoring systems, the proposed Eagle Mountain Landfill could well become one of the world's safest landfills and a model for others to emulate.

Pet. App. 42.

The state courts found that an initial environmental assessment did not comply with state law. In 1996, BLM and Riverside County produced a new 900-page draft Environmental Impact Statement (EIS). In 1997, after a further period of review, which included tens of thousands of pages of comments and four public hearings, BLM issued a Record of Decision (ROD) approving the land exchange and published a final EIS spanning 1600 pages. Pet. App. E, K (EIS excerpts). The full administrative record is approximately 50,000 pages.

The EIS's summary paragraph of the brief statement of the purpose and need for the project to which BLM "is responding," 40 C.F.R. § 1502.13, states:

> The primary purpose of the Project is to develop a new Class III nonhazardous municipal solid waste landfill to meet the projected long-term demand for environmentally sound landfill capacity in Southern California; provide a long-term income source from the development of a nonhazardous municipal solid waste landfill; find an economically valuable use for the existing by-products at the Kaiser Eagle Mountain Mine site, including use of existing aggregate and overburden; and provide long-term land use and development goals and guidance for the Townsite.

Pet. App. 335 (EIS excerpt). The EIS then immediately details how the project fulfills a public purpose, including because the government will use the "long-term income source" provided by the landfill to acquire valuable habitat for protected species, fund environmental monitoring and mitigation, and acquire private parcels in Joshua Tree National Park. *See generally* Pet. App. K.

BLM studied in detail the land exchange proposed by Kaiser, as well as four alternatives that would have involved some different form of exchange, and also the option of rejecting the project outright. BLM studied more briefly other alternatives for addressing the region's landfill shortage without any land exchange – such as municipal waste measures, the siting and operation of other landfills, and waste

management alternatives – because those alternatives are a matter of state and local jurisdiction, beyond BLM's authority under the Management Act.

The U.S. Fish and Wildlife Service on three separate occasions found that the project presented "no jeopardy" to threatened or endangered species. Based on Kaiser's adoption of unprecedented environmental mitigation measures, the National Park Service agreed that the project complied with NEPA and CEQA and also specifically protected Joshua Tree National Park – the outer boundaries of which are near the project. The relevant state entities approved a zoning change, land use permits, and permits governing airborne emissions.

The Secretary of the Interior found as a matter of fact under the Management Act that the "public interest" would be "well serve[d]" by the exchange, 43 U.S.C. § 1716(a), because the project would not only fill a substantial public need for landfill space, but also provide the significant public benefit of protection of threatened and endangered species of plants and animals, Pet. App. 237-38. The agency furthermore determined that "all practicable means to avoid or reduce environmental harm have been adopted." *Id.* 270. *See also id.* 167 n.18.

In assessing the property so that "the values [would] be equalized by the payment of money," 43 U.S.C. § 1716(b), BLM found in the so-called "Yerke appraisal" that the determinative "most probable" use for the government's property, 43 C.F.R. § 2200.0-5, would be "holding [it] for speculative investment," Pet. App. 7. On that basis, BLM calculated that the government's property was worth

roughly $20,000 more than the property exchanged by Kaiser, *id.*, which then paid the difference.

3. Respondents National Parks Conservation Association (Conservation Association) and Donna and Laurence Charpied oppose the landfill project. Administratively, respondents protested the EIS, the Secretary's public interest determination, and BLM's valuation of the property. BLM responded to each of respondents' objections and denied their protests. Pet. App. D.

Respondents challenged the project in state court under CEQA, which is generally regarded as more stringent than federal law. The state courts rejected those claims. *Nat'l Parks & Conservation Ass'n v. County of Riverside*, 84 Cal. Rptr. 2d 563 (Cal. Ct. App. 1999).

Respondents also appealed administratively. In 1999, already one decade into Kaiser's effort to conduct the land exchange, the Interior Board of Land Appeals (IBLA) denied those appeals in an extensive opinion. Pet. App. C. In October 1999, the land exchange was consummated.

4. Respondents separately filed this suit in federal district court under the Administrative Procedure Act (APA) against the federal government and Kaiser seeking to undo the exchange and to block the project. During the suit's pendency, Kaiser has not proceeded with construction of the landfill because its further investment would be lost if the federal courts overturn the land exchange. The district court did not decide the parties' motions for summary judgment until five years after the suit was

filed and three years after the briefing was fully submitted.

In the interim, the case law governing appraisals for land exchanges changed in one narrow respect. In *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1181 (9th Cir. 2000), the Ninth Circuit held for the first time that, in a case such as this one, BLM must explicitly determine whether there is a "market" to purchase the government's property "for landfill development." If so, and if landfill use would constitute the property's "highest and best use," then the appraisal of the government's property must account for that use – presumably by increasing its assessed value. *Id.* at 1182.

In this case, respondents invoked the *Desert Citizens* holding. In the earlier administrative proceedings, they had not identified a market to purchase the government's property for landfill use or otherwise argued that the agency improperly failed to account for that potential use. (The Conservation Association asserted in the district court that it would have been futile to make that argument to BLM.) In their motion for summary judgment in district court, respondents relied on a new appraiser's declaration, urging the district court to invalidate the Yerke appraisal because it did not expressly address the existence of a market for landfill use.

BLM promptly responded by "supplement[ing] the administrative record." Pet. App. 300. It commissioned a further expert assessment – the "Herzog report" – to determine whether there was, in fact, a market for landfill development and whether landfill use was the property's "highest and best use."

See id. 305-06. Directed to assess the prior Yerke appraisal "[i]n light of the *Desert Citizens* decision," *id.* 312, Herzog found that there was no such market and that landfill use was not the property's "most probable legal use," 43 C.F.R. § 2200.0-5, because a putative investor would conclude that the slim prospect of a financial return meant that a landfill was not "a financially feasible use." Pet. App. 91. Herzog explained that in his expert opinion the abandonment by several significant operators of proposed landfill investments in the region (including subsequent to the *Desert Citizens* decision) demonstrated that "[a] knowledgeable investor with millions of dollars to invest would not have considered investment in a rail-haul landfill to be the route to obtaining a reasonable return on the investment." *Id.* 92.

BLM agreed. The agency's Chief State Appraiser produced a report adopting Herzog's reasoning and conclusions. Pet. App. J. BLM's District Manager in turn reviewed the Herzog report and the Appraiser's report, agreed with both, Pet. App. I, and concluded on that basis that it is not "necessary to revise or revisit the District Manager's [prior decision] approving the [land] exchange." *Id.* 303. In 2002 – eight years ago – BLM formally added the Herzog report, the BLM Appraiser's approval, and the District Manager's decision to the administrative record and reaffirmed both its prior determination that landfill use was not the property's highest and best use and also its prior valuation of the property. Pet. App. H. Respondents did not appeal that administrative action. BLM lodged this further

record material and agency determination with the district court. *id.*

When the district court did finally act in 2005, it granted respondents summary judgment, "set aside" the land exchange, remanded the matter to BLM, and retained jurisdiction to decide any further challenges. Pet. App. B. Principally, the district court vacated BLM's substantive determination that the land exchange furthered the public interest and accordingly should be undertaken. Pet. App. 116-17. The court also concluded, *inter alia*, that BLM initially failed to appraise the government property properly under the *Desert Citizens* ruling, *id.* 119-20; that the EIS too narrowly defined the "purpose and need" for the project, *id.* 132-34; and that the EIS failed to give sufficient consideration to the issue of "eutrophication," *id.* 124-25 – *viz.*, "the introduction of nutrients to the desert environment" through "(1) landfill waste material; and (2) nitrogen-bearing airborne emissions," *id.* 23 n.8.

3. Kaiser and BLM appealed. The Ninth Circuit did not decide the case for a further four years, at which point it reversed in part and affirmed in part and remanded to BLM in an opinion by Judge Pregerson joined by Judge Paez. Pet. App. A. Senior Judge Trott dissented from the portions of the majority's ruling invalidating the agency's actions and remanding the case back to BLM.

As to the BLM's substantive decision, the panel unanimously upheld the agency's determination to undertake the land exchange because "the public interest will be well served" thereby. 43 U.S.C. § 1716(a). Reversing the district court's contrary holding, the Ninth Circuit concluded that the agency

had properly determined to undertake the exchange after "full consideration" of an array of state and local interests. Pet. App. 22. The court of appeals concluded that "the record as a whole establishes" that through "the analyses in the EIS" the agency appropriately considered whether the land exchange serves the public interest. *Id.* The court not only recognized that "the Final EIS alone includes over 1,600 pages of material . . . including detailed environmental analyses," *id.*, but it also specifically deemed "sufficient," *id.* n.7, the agency's finding that "disposal of these [public] lands in exchange for [Kaiser's] wildlife habitat plainly entails a net gain for the public," *id.* 50, including because "the acquired private lands have substantial value for threatened and endangered species," *id.* 49.

But by a divided vote, the court of appeals affirmed the district court's summary judgment ruling in three respects. *First*, the majority held that BLM's initial "Yerke appraisal" in 1996 failed to consider whether a market existed to purchase the government's property for landfill use, as required by that court's intervening ruling in *Desert Citizens*, *supra*. Pet. App. 15-20. Because the Yerke appraisal contained no contrary evidence, the majority held that by analogy to the facts of *Desert Citizens* "the highest and best use analysis should have taken the reasonably probable use of public lands for a landfill into consideration as part of the highest and best use analysis." *Id.* 20.

Petitioner argued on appeal that a remand to the agency was pointless because, subsequent to the Yerke appraisal, BLM in 2002 had responded to *Desert Citizens* by commissioning and adopting the

Herzog report, which found no market for landfill use, and by then reaffirming that landfill use was not the property's highest and best use. The majority did not doubt petitioner's submission that through the Herzog report BLM "did consider highest and best use, as required by our decision in *Desert Citizens*," Pet. App. 19 n.5, or that Herzog showed that, unlike in *Desert Citizens*, here there is no "market for landfill development," *Desert Citizens*, 231 F.3d at 1181. Yet the majority refused to "consider the 2002 Herzog report" because that report "was not before either BLM or the Appeals board" when the agency issued its ROD in 1997. Pet. App. 19 n.5. The majority read Ninth Circuit precedent to provide that a court will not consider "supplemental materials presented after the onset of litigation" in cases that involve challenges "to final agency action." *Id.* (citing *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006)). Nor will it do so unless the agency "has cured the defects" of its prior decision "on a basis that is immune from challenge" and is moreover itself a final agency decision subject to appeal. *Id.* (citing *Friends of the Clearwater v. Dombeck*, 222 F.3d 552 (9th Cir. 2000)). Because the majority believed those criteria were not met, it deemed the Herzog report to be irrelevant as a matter of law. *Id.*

Second, the majority held that BLM had erred when it "briefly specif[ied] the underlying purpose and need" for the land exchange, 40 C.F.R. § 1502.13. *See* Pet. App. 23-29. Whereas the full court had found that the "record as a whole" demonstrated that the landfill would well serve the public interest, *id.* 22, on this question Judge Pregerson looked only at

the wording of one summary paragraph. The majority agreed that the paragraph set forth an "unquestionably [] valid BLM purpose" to "meet long-term landfill demand." But the majority believed that other language in the paragraph impermissibly acknowledged three goals of Kaiser's for the land exchange that "can hardly be characterized as BLM needs." *Id.* 27.

The majority suggested that by so acknowledging Kaiser's private purposes the paragraph could have caused BLM not to study in detail alternative plans to address landfill shortages without engaging in the land exchange, because those alternatives were inconsistent with Kaiser's goals. The majority recognized that BLM had thoroughly studied the environmental consequences of not only the proposed land exchange, but also four variations on the exchange and also the option of rejecting the project outright, *id.* – *i.e.*, every alternative that the governing statute (the Management Act) would permit BLM to implement. But the majority believed that "[s]uch a narrowly drawn statement necessarily and unreasonably constrain[ed] BLM's consideration of" still other alternatives to addressing landfill need that did not involve the proposed land exchange. *Id.*

The majority acknowledged that the agency's determination that the land exchange furthered the public interest and should therefore be undertaken, which the court had unanimously approved, "gave full consideration to the public interest factors," including by studying in detail the environmental consequences of the exchange. *Id.* But it opined that even its own approval of the only governmental action under consideration – the land exchange under

the Management Act – "has no bearing on the adequacy of the EIS under NEPA." In the view of the majority, "the ends" of the determination that the exchange is environmentally beneficial cannot "justify the means" of failing to study even those alternatives that the agency could not implement. *Id.*

Third, the majority concluded that the land exchange was invalidated by the EIS's discussion of one environmental issue under Ninth Circuit precedent providing that a court's review of an EIS "consider[s] not only its content, but also its form." *Id.* 32 (citing *California v. Block*, 690 F.2d 753 (9th Cir. 1982)). According to Judge Pregerson, the EIS impermissibly failed to set forth a single, consolidated "discussion of eutrophication." *Id.* Judge Pregerson recognized that the substance of the EIS did in fact address eutrophication in several sections and accordingly did not accept respondents' submission that BLM had failed to study the issue adequately. The majority nonetheless deemed the "form" of the EIS's discussion of eutrophication to be invalid because it addressed that issue in the context of other "varied" environmental issues, rather than "up front" in a single section. *Id.* As a result, "[a] reader seeking enlightenment on the issue would have to cull through entirely unrelated sections of the EIS and put the pieces together." *Id.*

On that basis, the majority affirmed the district court's judgment vacating approval of the land exchange and remanding the case back to BLM to commence a third decade of proceedings. *Id.* 35.

Judge Trott dissented from the majority's decision to invalidate the land exchange and remand

the case to BLM, which he regarded as "a clear exercise in blind form over substance." *Id.* 96. Addressing the majority's conclusion that BLM initially failed to determine properly whether landfill use could be the "highest and best use" of the government property, Judge Trott explained that when "respondents did insert this new issue into the district court case" by raising it for the first time in their motion for summary judgment, the "BLM did what it would have done had it been given timely notice of this additional concern [in the administrative proceedings]: they hired a *new* independent appraiser – Stephen Herzog – to evaluate it" and "supplement the administrative record." *Id.* 91. Judge Trott explained that Herzog determined that "landfill use" is not the "highest and best use" for the property because an investor would conclude that the exceptional difficulty in securing the required governmental approvals would outweigh the low prospect of a return on investment. By contrast, respondents' reliance on petitioners' own landfill proposal was misguided:

> So, if this is true, that there was no market for the federal lands as a landfill, why would Kaiser doggedly pursue this proposal? *Because Kaiser already owns the abandoned holes in the ground and the railroad necessary to serve it* and has a considerable investment in the project. The idea that someone else might purchase the federal lands for a landfill is palpably and demonstrably hallucinatory.

Id. 92. Because the majority did not doubt Herzog's conclusions, but instead refused to consider his report

and BLM's action on the basis of it, Judge Trott would not have "sen[t] the case back to [BLM] to do something BLM has already done." *Id.* 36.

Judge Trott then turned to BLM's obligation to "briefly specify the underlying purpose and need to which the agency is responding," 40 C.F.R. § 1502.13. He found compelling that the court of appeals had unanimously upheld the agency's determination to approve the land exchange based on the now-settled finding that "the public interest will be well served" thereby. Pet. App. 20-22 & n.7. "[The majority] grudgingly conclude[s] that BLM adequately determined that the public interest is served by the landfill, but, in the same breath, they claim to have found a defect in BLM's *articulation* of a public purpose and need. How can a project that satisfies the rigorous public interest demands of the [Management Act] fail because its purpose and need over represents primarily private goals and objectives?" *Id.* 54 (emphasis added).

Judge Trott explained that the majority's exclusive reliance on the fact that one summary paragraph of BLM's required brief statement of purpose and need acknowledges Kaiser's goals in proposing the land exchange "completely misunderstands the purpose of this requirement in a setting where a private entity approaches a government entity with a joint project that will benefit both." *Id.* 44. "Of course BLM acknowledged Kaiser's purpose – *the law requires BLM to do so*! For private, non-federal proposals, '[a]gencies . . . are precluded from completely ignoring a private applicant's objectives.'" *Id.* 46-47 (brackets in original) (quoting *Colo. Envt'l Coal.*, 185 F.3d at

1175, and citing *Citizens Against Burlington*, 938 F.2d 190). The majority's suggestion that this one summary paragraph dominated BLM's assessment of the project moreover ignores the EIS's ensuing discussion of the project's public purpose, including the subsequent "12 pages reviewing and analyzing a 'critical' landfill capacity shortfall . . . . During this particularized discussion, Kaiser's obvious pecuniary goals are nowhere in sight." *Id.* 46.

Judge Trott finally stated that in his view there was no merit to the majority's holding that the "form" of the EIS invalidates the land exchange because its discussion of "eutrophication" is too dispersed. Quoting for several pages both the applicable sections of the EIS and the IBLA's decision rejecting respondents' appeal, *id.* 63-77, Judge Trott explained: "[T]he BLM *did* examine eutrophication and determined – correctly so from the record – that it was *not* a serious issue," *id.* 65 (emphases in original). In his view, the majority's characterization of the EIS as a "patchwork" "demonstrably and grossly mischaracterizes the record, and is flatly wrong. It inappropriately gives the back of this Court's hand to a massive and thorough process and resulting responsible environmental decisions and documents." *Id.* 79.

4. Kaiser's petition for rehearing and rehearing en banc produced various amendments to the panel opinion. (Citations in the petition are to the final opinion, which is set forth in the Appendix.) But further review of the decision was denied. Pet. App. F. Kaiser then sought a stay of the mandate, arguing that this Court was likely to review the panel's ruling. The court granted the stay without dissent.

REASONS FOR GRANTING THE WRIT

This Court's intervention is required to bring the Ninth Circuit's precedent into line with this Court's decisions and to resolve the conflict the decision below creates with rulings of other circuits, particularly given the manifest public importance of the specific project at issue in this case. This Court has repeatedly recognized that agency mistakes require a remand for further proceedings only if there is a substantial prospect that the agency's decision will change as a result. The D.C., First, Seventh, and Eighth Circuits have all specifically applied that settled principle to reject the assertion – accepted by the Ninth Circuit in this case – that agency errors in the form and scope of an EIS automatically warrant vacating the agency's decision. Those courts instead look to whether the alleged error affected the agency's substantive decision and whether there is anything practical to be gained by a further environmental review. In this case, those four circuits would have upheld the agency's approval of the land exchange, recognizing that respondents' "flyspecking" of the EIS is immaterial to the agency's actual decision to enter into the exchange and that further environmental review cannot affect the agency's determination to conduct the land exchange because it is in the public interest.

I. This Court's Precedents And Decisions Of Other Circuits Hold That It Is Erroneous To Vacate Agency Decisions When Further Proceedings Would Not Produce A Different Result Or Serve Any Other Substantive Purpose.

In *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969), a plurality of this Court rejected the invitation to "convert judicial review of agency action into a ping-pong game" and held that under the APA it is erroneous to vacate agency action and remand for further proceedings when doing so would be "an idle and useless formality." In that case, although the NLRB had improperly promulgated a rule requiring employers to disclose certain documents for use in a union election, the Court recognized that the Board nonetheless had the independent power to order such a disclosure. The plurality concluded that, because "the *substance* of the Board's command is not seriously contestable," "[i]t would be meaningless to remand." *Id.* (emphasis added). The Court subsequently treated the plurality's ruling in *Wyman* as binding precedent in *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1*, 128 S. Ct. 2733, 2745 (2008).

Similarly, in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), this Court held that the decision whether to find agency error and remand for further proceedings must be made "[m]indful of Congress' admonition [in the APA] that in reviewing agency action, 'due account shall be taken of the rule of prejudicial error,' 5 U.S.C. § 706." *Id.* at 659 (citing *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("In

administrative law, as in federal civil and criminal litigation, there is a harmless error rule . . . .")). In that case, the Court held that an environmental organization's objection that the Environmental Protection Agency (EPA) had taken an inconsistent position on the question of whether it was required to consult with other agencies before transferring to a state the authority to issue certain permits is not "the type of error that requires a remand." *Id.* Whether or not required, "the EPA had already consulted" with FWS. *Id.* Furthermore, "the agencies involved have resolved any ambiguity in their positions going forward" through their statements "[f]ollowing the issuance of the panel's opinion below." *Id.* at 660 n.5; *see also Mass. Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 248 (1964) (Harlan, J.) (Court will not reverse an agency's action "when a mistake of the administrative body is one that clearly has no bearing on the procedure used or the substance of decision reached").

Other circuits have consistently adhered to this Court's precedent in refusing to vacate agency decisions on the basis of a diverse array of alleged errors that could not produce a different result on remand. *See, e.g., U.S. Telecom. Ass'n v. FCC*, 400 F.3d 29, 41-42 (D.C. Cir. 2005) (failure to follow notice and comment rulemaking harmless error when parties were given equivalent opportunity to comment); *Dantran, Inc. v. U.S. Dep't of Labor*, 171 F.3d 58, 73 (1st Cir. 1999) (remand is not appropriate if it "will amount to no more than an empty exercise"); *Sierra Club v. Slater*, 120 F.3d 623, 637 (6th Cir. 1997) (agency's failure to provide notice of required water quality certification was harmless

when it would not "affect the public's review of the proposal"); *Fisher v. Bowen*, 869 F.2d 1055, 1057 (7th Cir. 1989) (Posner, J.) ("No principle of administrative law or common sense requires us to remand a case in quest of a perfect opinion unless there is reason to believe that the remand might lead to a different result."); *NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982) (remand is required "only where there is a significant chance that but for the error, the agency might have reached a different result" (emphasis omitted)).

This Court has not considered the circumstances in which supposed errors in EISs require vacating agency action and remanding for further proceedings, but four courts of appeals – the D.C., First, Seventh, and Eighth Circuits – have. Each has squarely held that agency errors in the promulgation and form of an EIS do not justify a remand to the agency that would produce the same result, at least so long as the public had the opportunity to comment on the agency's initial environmental assessment.

The precedent of the D.C. Circuit, which hears more agency appeals than any other court, is particularly well settled and instructive. In *Nevada v. Department of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006), the D.C. Circuit reaffirmed its settled precedent that reversal and remand to an agency is inappropriate "where the proposing agency engaged in significant environmental analysis before reaching a decision but failed to comply precisely with NEPA procedures." In that case, the State of Nevada alleged that the EIS for the Yucca Mountain waste facility impermissibly failed to identify a "preferred alternative or alternatives" to the proposed project.

40 C.F.R. § 1502.14(e). The D.C. Circuit held that any "violation was harmless error," because there would be "no purpose" in invalidating the Yucca Mountain EIS and remanding for a further round of litigation: "NEPA's goal of ensuring that relevant information is available to those participating in agency decision-making was not frustrated by the absence of language designating the Caliente Corridor as the DOE's preferred alternative." *Nevada*, 457 F.3d at 90. In the view of the D.C. Circuit, the relevant inquiry is whether "the public had sufficient information to comment on" the agency's determination, a standard that was satisfied by "[t]he many comments submitted in response to the" EIS. *Id.*

The D.C. Circuit in *Nevada* relied on that court's prior decision in *Illinois Commerce Commission v. ICC*, 848 F.2d 1246 (D.C. Cir. 1988) (per curiam). In that case, notwithstanding that the agency failed to publish a required environmental assessment at all, the D.C. Circuit held that a remand was not required because the agency had engaged in an environmental analysis of the project. "An order to the Commission to prepare an EA or an EIS for a third time would be a meaningless gesture, not necessary to guarantee that the Commission will consider environmental concerns when it authorizes abandonments." *Id.* at 1257. In support, the court quoted Judge Friendly's admonition that an agency's procedural error is not a basis for a remand "where it would accomplish nothing 'save further expense and delay.'" *Id.* (quoting *Kerner v. Celebrezze*, 340 F.2d 736, 740 (2d Cir. 1965)). *See also Friends of the River v. FERC*, 720 F.2d 93, 107 (D.C. Cir. 1983) (Ginsburg and

Scalia, JJ.) ("Sending the matter back 'to teach the agency a lesson' would be an essentially punitive measure: we can discern no benefit to the public in such a course, and no genuine service to the policies NEPA advances.").

The First Circuit followed the D.C. Circuit's lead in *Save Our Heritage, Inc. v. FAA*, 269 F.3d 49 (1st Cir. 2001) (Boudin, J.), which addressed whether the FAA erred by not producing an EIS in deciding to permit additional flights at Hanscom Field outside of Boston, Massachusetts. The First Circuit held that, although the agency's determination that there would be only minimal environmental effects was not made in the formal EIS process, any error did not justify overturning the agency decision and remanding. Citing the precedent of the D.C. Circuit, the court explained, "[I]t makes no sense to remand for an environmental assessment where, as here, the FAA has already made a reasoned finding that the environmental effects are *de minimis*." *Id.* at 61.

The Seventh Circuit applies the same rule. In *Glisson v. United States Forest Service*, 138 F.3d 1181, 1183 (7th Cir. 1998) (Posner, J.), the plaintiffs complained that the environmental assessment for a forest restoration project impermissibly failed to address the endangered status of an adversely affected species of pine trees. The Seventh Circuit rejected the argument that "the oversight in the environmental assessment warrants reversal." *Id.* The court of appeals recognized that if the agency had considered the issue it would have concluded that "the impact on the pines is not an adequate reason for blocking the project." *Id.* As such, "a remand for better findings would serve the plaintiffs'

interests in delaying the [project], but no other interests, for it is plain what those findings must be. [*SEC v. Chenery Corp.*, 332 U.S. 194 (1947)] does not require futile remands." *Id.* (first brackets in original) (quoting *Cronin v. Dep't of Agric.*, 919 F.2d 439, 442-43 (7th Cir. 1990) (Posner, J.)).

Finally, in *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999), the Eighth Circuit held that the failure in an EIS to study alternatives that are not "viable" under the governing statute is not a basis for vacating and remanding the agency's action. The plaintiffs in that case claimed that an EIS for the Forest Service's management of a wilderness area was flawed because, *inter alia*, it "failed to include" those "reasonable alternatives" that would have increased visitor use. *Id.* "The [plaintiffs] complain[ed] that the Forest Service had a predisposition toward alternatives that would reduce visitor use." *Id.* at 1128-29. The Eighth Circuit deemed any error to be harmless because the applicable statute required the Forest Service to "attain the widest range of beneficial uses of the environment without degradation," 42 U.S.C. § 4331(b)(3), and the Forest Service had determined that "current visitor use levels are beginning to strain the viability and solitude of the wilderness area." 164 F.3d at 1129. A remand would be inappropriate because the alternatives identified by the plaintiffs were thus not "viable." *Id.*

II. The Ninth Circuit's Decision In This Case Conflicts With This Court's Precedents And With Decisions Of Other Circuits.

The Ninth Circuit's formalistic decision in this case cannot be reconciled with this Court's holding that in deciding whether to vacate and remand agency action, a reviewing court must determine whether there is a realistic prospect that the agency would reach a different result or that further proceedings would serve some other substantive purpose. The ruling below equally conflicts with the rulings of other circuits applying that principle to alleged errors in the promulgation and form of EISs.

First, other circuits would reject the Ninth Circuit's holding that agency action must be reversed and the case remanded – notwithstanding that intervening agency action makes it clear that the agency will adhere to its decision so that further proceedings will be entirely futile – unless the intervening agency action both amounts to "a final, appealable decision" and is "immune to challenge." Pet. App. 19 n.5. In this case, other circuits would hold that a remand for further proceedings would be inappropriate because eight years ago, the BLM commissioned and formally adopted the Herzog report, which already answers the precise question that the Ninth Circuit has directed BLM to consider on remand by finding that there is no market to purchase the government's property for landfill use and that landfill use is not the property's "highest and best use." Pet. App. I, J. As Judge Trott explained, "what [respondents] say BLM did not do *has in fact been done*, and remains unchallenged by them," *id.* 96 (emphasis in original). Respondents

declined to appeal the agency's conclusions reached on the basis of the supplemented record, *see* 43 C.F.R. §§ 4.410(a), .411(a), which are not called into question by the ruling below.

No other court of appeals accepts the Ninth Circuit's view that it is appropriate to order a pointless remand on the theory that a court is required to blind itself to the agency's formal supplementation of the administrative record. Pet. App. 19 n.5. Consistent with this Court's recognition that "a harmless error rule" applies to review of administrative decisions, *Nat'l Ass'n of Home Builders*, 551 U.S. at 659 (quoting *PDK Labs., Inc.*, 362 U.S. at 799), other circuits would find dispositive that the agency "has already made a reasoned finding" that there is no market for landfill use, *Save Our Heritage*, 269 F.3d at 61. "[A] remand for better findings would serve the plaintiffs' interest in delaying the [project], but no other interests, for it is plain what those findings must be." *Glisson*, 138 F.3d at 1183 (internal quotation marks and citation omitted; brackets in original). Indeed, BLM's reaffirmation of its prior determination of the property's value in light of the Herzog report would be controlling even if it had occurred "[f]ollowing the issuance of the panel's opinion below" in 2010, rather than in 2002. *Nat'l Ass'n of Home Builders*, 551 U.S. at 660 n.5.

Second, other circuits would reject the Ninth Circuit's holding that an error in an agency's formulation of a paragraph of an EIS merits vacating the agency action and remanding, even assuming that the error caused the agency not to study alternatives that it had no power to implement. The

majority below held that BLM erred when it "briefly specif[ied]" the "purpose and need to which [it was] responding," 40 C.F.R. § 1502.13, by acknowledging in a summary paragraph Kaiser's purposes in promoting the project. Pet. App. 27-29. Preliminarily, those courts would agree with Judge Trott that BLM did not err because in "responding" to Kaiser's proposal, 40 C.F.R. § 1502.13, "*the law requires*" BLM to acknowledge Kaiser's purposes, Pet. App. 47 (citing cases) (emphasis in original). And those courts would conclude that the agency properly accounted for both public and private purposes in light of the extensive discussion of the public interest in which Kaiser's goals "are nowhere in sight." *Id.* 46. Indeed, the majority below flatly mischaracterized even the one paragraph on which it relies: in fact, one of the three goals that Judge Pregerson found objectionable – securing a "long-term income source" provided by the landfill – is a *public* goal, because those revenues will be received by the government (not Kaiser) and will be used for an array of environmental projects.

But even if other courts were willing to assume that BLM did technically err in this one summary paragraph, they would deem it inappropriate to vacate and remand the land exchange for BLM merely to go through the formalistic step of redrafting it. The regulation in question contains no substantive command, but merely requires the agency to "briefly specify" the purposes and needs to which it is "responding." 40 C.F.R. § 1502.13. Because NEPA merely requires that an agency take a "hard look" at environmental concerns rather than reaching any particular result, *Marsh v. Oregon*

Natural Resources Council, 490 U.S. 360, 374 (1989), other circuits have squarely rejected indistinguishable attempts to "'flyspeck[]'" the words of an EIS. *E.g.*, *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 704 (10th Cir. 2009); *Friends of Boundary Waters*, 164 F.3d at 1128. The Ninth Circuit's very different, and far more searching, review of EISs has been the source of recurring controversy. *See, e.g.*, *Ecology Center, Inc. v. Austin*, 430 F.3d 1057, 1072 (9th Cir. 2005) (scrutiny of 1900-page EIS over dissent arguing that majority addressed "only parts of this record" and changed "our posture of review to one where we sit at the table with [agency] scientists and second-guess the minutiae of the decisionmaking process"); *Sierra Club, Inc. v. Austin*, 82 Fed. Appx. 570, 576 (9th Cir. 2003) (detailed review of 1100-page EIS over dissent by Judge Kozinski that "satisfying the majority's nitpicking . . . will needlessly delay by at least two years a much-needed response to an emergency that is already three years old").

For two independent reasons, other circuits would also reject the Ninth Circuit's further suggestion, Pet. App. 27, that a remand is required because BLM's statement of purpose and need may have caused the agency not to study alternative landfill plans under which BLM would not enter into any exchange of land. Initially, they would find it dispositive that "the substance of the [BLM's] command [to undertake the land exchange] is not seriously contestable." *Wyman*, 394 U.S. at 766 n.6. The Ninth Circuit thus affirmed the agency's approval of land exchange and explicitly deemed "sufficient," Pet. App. 22 n.7, the agency's finding and

rationale that "disposal of these [public] lands in exchange for [Kaiser's] wildlife habitat plainly entails a net gain for the public," *id.* 50. BLM's decision under the Management Act to conduct the exchange is now final, except for the formalistic re-entry of the Herzog report into the administrative record for a second time. *See supra.*

It is thus now decisively settled that "the public interest will be well served by making [this land] exchange," 43 U.S.C. § 1716(a), and there is no prospect that BLM will reverse its determination to do so, as the Management Act represents the only substantive constraint on the agency's action. Given that BLM has *already* concluded that the alternatives to the land exchange the Ninth Circuit suggested should be studied are "not an adequate reason for blocking the project," *Glisson* 138 F.3d at 1183, the precise form of "BLM's articulation of the project's purpose and need," Pet. App. 54 (Trott, J., dissenting), is no basis for overturning the agency's action. Neither an agency's failure in the EIS to address a "preferred alternative," *Nevada*, 457 F.3d at 90, nor its "predisposition toward [other] alternatives," *Friends of Boundary Waters*, 164 F.3d at 1129, is a basis for reversal if, as in this case, the error did not affect the agency's judgment. The point is not, as the majority below thought, that "the ends justify the means," Pet. App. 29 n.9, but rather that the "end" of BLM's deliberative process has already been determined by an entirely separate "means" (approval under the Management Act) that the court of appeals has now unanimously affirmed.

In addition, other circuits would refuse to order a further study of alternative proposals that involve no

land exchange because those alternatives are not "viable" under the Management Act. *Friends of the Boundary Waters*, 164 F.3d at 1129. Judge Pregerson thus acknowledged that BLM had studied in detail the land exchange, four variations on the exchange, and conducting no exchange at all, Pet. App. 28 – which were all the options available to it under the Management Act. Nor did the majority attempt to suggest that the public's participation in the environmental review – which took several years and involved extensive public input including four hearings – was "frustrated" in any respect by BLM's failure to study in detail still other alternatives that it had no power to adopt. *Nevada*, 457 F.3d at 90. There is accordingly no basis for a remand to engage in such an empty and meaningless exercise in "frivolous boilerplate." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 551 (1978).

To be sure, although the remand for such a further study will inevitably be pointless, there is reason to doubt that it will be brief or painless. The production of the existing EIS for the land exchange took years of study coordinated by federal, state, and local governments. If past is prologue, a still further detailed assessment of how the environment would fare in the entirely hypothetical but legally impossible world in which BLM ordered landfill development without any form of land exchange will take several more years at a cost of millions of dollars to the taxpayers. But even if BLM studies those alternatives for a further decade and produces a new and improved EIS that is 3200 pages long, this time on a record of 100,000 pages, the upshot of the

administrative proceedings will be the same: BLM will still have concluded that land exchange already consummated in this case serves the public interest and therefore merits approval.

Third, for the same reason, other circuits would reject the Ninth Circuit's conclusion that an EIS is invalid and agency action should be vacated *ipso facto* whenever the court of appeals finds no error in the EIS's "content" but is able to discern a flaw in its "form." Pet. App. 32. The majority below held that the EIS's supposed failure to discuss the issue of eutrophication "up front" requires vacating the land exchange and remanding for the BLM to go through the formalistic exercise of revising the EIS's language so that the reader does not have "to cull through entirely unrelated sections of the EIS and put the pieces together." *Id.* Judge Pregerson's opinion thus did not accept respondents' submission that the agency had failed to seriously consider that issue, much less that the agency was obliged to conclude that eutrophication presents a genuine environmental concern for the project.

As discussed above, other circuits would regard the error that the majority below purported to find to be no more than a forbidden effort to "flyspeck" the words of the EIS. But even in the unlikely event that another court of appeals would adopt the view of the majority below that it was appropriate to search the 1600 pages of the EIS in this case to find a supposed flaw in its wording, the D.C., First, Seventh, and Eighth Circuits would explicitly reject the Ninth Circuit's "insistence on form" and hold that an agency's action is valid so long as its environmental

analysis is "*substantively* unassailable." *Friends of the River*, 720 F.2d at 105.

The proceedings on remand with respect to the EIS are thus foreordained and a complete waste of time for everyone – everyone except respondents, who transparently are pursuing every conceivable argument in any possible forum for an indefinite period in the (thus far validated) hope that the process will go on forever and function as a substantive barrier to the landfill's construction. Certiorari should be granted to bring the Ninth Circuit's precedent into conformance with this Court's decisions and to resolve the conflict created between the ruling below and decisions of other courts of appeals.

III. The Significance Of The Question Presented Is Beyond Dispute.

This Court's intervention is also warranted because the already manifest importance of the question presented is substantially magnified by the special significance of this specific case. The question of what kinds of errors are sufficiently consequential to merit vacating agency action can arise in any challenge brought under the APA, all of which are subject to "Congress' admonition that in reviewing agency action, 'due account shall be taken of the rule of prejudicial error,' 5 U.S.C. § 706." *Nat'l Ass'n of Home Builders*, 551 U.S. at 659. This case in particular presents this Court with its first opportunity to apply that important principle to the frequently recurring context of challenges to agency decision-making under NEPA, including specifically with regard to EISs.

The requirement under NEPA that an EIS be produced for environmentally significant governmental action, 42 U.S.C. § 4332(2)(c), regularly embroils administrative agencies in time-consuming litigation. Those challenges are brought by both environmental groups and industry. Their only common thread is that the plaintiffs frequently seek to "flyspeck" the agency's analysis for arguable errors. Given that EISs are frequently massive, almost always highly technical, and generally derived from an expansive factual record, a committed opponent can almost always identify some minor flaw.

This case is a perfect example, and the precedent it sets charts a deeply troubling course for the future of administrative review of EISs in the Ninth Circuit, which is the source of far more such challenges than any other court of appeals, including even the D.C. Circuit. The EIS of the Kaiser land exchange is 1600 pages long and the record is comprised of roughly 50,000 pages. If the trivial errors identified by the majority below are sufficient to upend a critical project that expert federal and state authorities carefully studied for a decade, then it is difficult to imagine an environmentally significant agency action that cannot be successfully attacked. At the very least, the ruling below is inarguably an open invitation for opponents to try. Their efforts will be rewarded at the least by significantly delaying the agency action – this land exchange, for example, was proposed in 1989, subjected to a searching environmental review, finally approved by BLM in 1999, and yet remains embroiled in litigation – and perhaps invalidating it altogether.

Importantly, under the regime enacted by the majority below, it is impossible for an agency to predict *ex ante* which of the hundreds of questions involved in complex environmental assessments will metamorphose into a landmine that a federal court will invoke to blow up the project a decade later. In this case, respondents did not even *argue* in the administrative proceedings that BLM's statement of the purpose and need was unreasonably narrow or that BLM had failed to assess whether there was a market for landfill use for the government's property, yet the Ninth Circuit permitted them to prevail on those claims in litigation under that court's precedent that "the exhaustion requirement should be interpreted broadly." Pet. App. 13. Agencies also have no map that allows them to navigate whatever (if any) disappearingly thin space exists between the D.C. and Tenth Circuits' holding that agencies *must* acknowledge the private purposes motivating projects and the Ninth Circuit's holding that such an acknowledgment may place too much weight on those purposes and invalidate the project altogether. *Compare Colo. Envt'l Coal.*, 185 F.3d at 1175 ("Agencies . . . are precluded from completely ignoring a private applicant's objectives.") *and Burlington*, 938 F.2d at 196 ("[T]he agency should take into account the needs and goals of the parties involved in the application.") *with* Pet. App. 24-25.

The open invitation to constant litigation proffered by the ruling below is not only a distracting waste of time and money, but it also undermines the very purposes of the nation's environmental laws. "Remands in such cases would inevitably breed cynicism about the law; they would likely yield going-

through-the-motions responses on the part of those told to attend to the court's costly, resource-consuming instruction to redo, under the proper heading, what has already been done effectively." *Friends of the River*, 720 F.2d at 108. As Judge Friendly put it with typical vividness, the "tedious process of administrative adjudication and judicial review" need not "be needlessly dragged out while court and agency engage in a nigh endless game of battledore and shuttlecock with respect to subsidiary findings." *Erie-Lackawanna R.R. Co. v. United States*, 279 F. Supp. 316, 354-55 (S.D.N.Y. 1967) (three-judge court), *aff'd with modifications and remanded*, *Penn-Cent. Merger & N & W Inclusion Cases*, 389 U.S. 486 (1968).

It is furthermore difficult to conceive of a more important and appropriate case in which to resolve the question presented. This is no ordinary agency action. The majority below enjoined the consummation of a project that is regarded as a "model" for projects the world over by vacating a land exchange that experts have concluded is "critical," not only because it provides desperately needed landfill space but also because the land exchange itself will provide the significant public benefit of protection of threatened and endangered species of plants and animals. This Court's failure to intervene will effectively doom the entire project to years of further intolerable uncertainty and allow respondents to continue to hijack the thorough and thoughtful environmental review process undertaken by the authorities charged by Congress with that essential responsibility.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC., AND
MINE RECLAMATION CORPORATION,

Petitioners,

v.

NATIONAL PARKS & CONSERVATION
ASSOCIATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A
Ninth Circuit Opinion

United States Court of Appeals,
Ninth Circuit.

NATIONAL PARKS & CONSERVATION ASSOCIATION, Plaintiff-Appellee,
v.
BUREAU OF LAND MANAGEMENT; United States Department of Interior, Defendants,
and
Kaiser Eagle Mountain, Inc.; Mine Reclamation Corporation, Defendants-Appellants.
Donna Charpied; Laurence Charpied; Desert Protection Society; Center for Community Action and Environmental Justice, Plaintiffs-Appellees,
v.

United States Department of Interior, Defendant, Bureau of Land Management; National Park Service; Bruce Babbitt, in his official capacity as Secretary of the Interior; Tom Fry, in his official capacity as Acting Director of the Bureau of Land Management; Al Wright, in his official capacity as Acting California State Director of the Bureau of Land Management; Tim Salt, in his official capacity as Bureau of Land Management California Desert District Manager; Robert Stanton, in his official capacity as Director of the National Park Service, Defendants,
and
Kaiser Eagle Mountain, Inc.; Mine Reclamation Corporation, Defendants-Appellants.
National Parks & Conservation Association, Plaintiff-Appellee,

v.

United States Department of Interior, Defendant-Appellant,
Bureau of Land Management, Defendant-Appellant,
and
Kaiser Eagle Mountain, Inc.; Mine Reclamation Corporation, Defendants.

Donna Charpied; Laurence Charpied; Desert Protection Society; Center for Community Action and Environmental Justice, Plaintiffs-Appellants,

v.

United States Department of Interior; Kaiser Eagle Mountain Inc.; Mine Reclamation Corporation; Bureau of Land Management; National Park Service; Bruce Babbitt, in his official capacity as Secretary of the Interior; Tom Fry, in his official capacity as Acting Director of the Bureau of Land Management; Al Wright, in his official capacity as Acting California State Director of the Bureau of Land Management; Tim Salt, in his official capacity as Bureau of Land Management California Desert District Manager; Robert Stanton, in his official capacity as Director of the National Park Service, Defendants-Appellees.

Nos. 05-56814, 05-56815, 05-56843, 05-56832, 05-56908.

Argued and Submitted Dec. 6, 2007.
Filed Nov. 10, 2009.
Amended May 19, 2010.

Appeal from the United States District Court for the Central District of California, Robert J. Timlin, District Judge, Presiding. D.C. Nos. CV-00-00041-RT, CV-99-00454-RT.

Before: HARRY PREGERSON, STEPHEN S. TROTT and RICHARD A. PAEZ, Circuit Judges.

Opinion by Judge PREGERSON; Dissent by Judge TROTT.

ORDER

The opinion filed on November 11, 2009 is amended as follows:

Slip opinion at page 15123 [586 F.3d 735, 747-48], first paragraph, line 7, delete portion of paragraph beginning "Furthermore" and concluding at the end of the paragraph with " *Id.*" Insert footnote at line 7, at the conclusion of the revised paragraph. The footnote shall read:

> DOI's current NEPA guidelines take the exact *opposite* approach to that of the Corps regulations in *Angoon*. DOI's NEPA handbook explains that the "purpose and need statement for an externally generated action must describe the BLM purpose and need, *not an applicant's or external proponent's purpose and need*." Department of Interior, Bureau of Land Management, National Environmental Policy Act Handbook 35, (citing 40 C.F.R. § 1502.13) (emphasis added), *available at* http:// www. blm. gov/ pgdata/ etc/ medialib/ blm/ wo/ Information_ Resources_ Management/ policy/ blm_ handbook. Par. 24487. File. dat/h1790-1-2008-1.pdf (citing 40 C.F.R. § 1502.13) (emphasis added). "The applicant's purpose

> and need may provide useful background information, but this description must not be confused with the BLM purpose and need for action.... It is the BLM purpose and need for action that will dictate the range of alternatives...." *Id.*

Slip opinion at page 15124 [586 F.3d at 748], line 4, delete the sentence beginning "That the BLM does not...." Replace with "Kaiser may desire to find a viable use for mine by-products located on its private land holdings, but the BLM has no need to do so."

Slip opinion at page 15125 [586 F.3d at 748], delete the final sentence of footnote 9.

All pending amicus motions are **GRANTED.** All petitions for panel rehearing and rehearing en banc remain pending.

OPINION

PREGERSON, Circuit Judge:

Kaiser Eagle Mountain, Inc. ("Kaiser") seeks to build a landfill on a former Kaiser mining site near Joshua Tree National Park ("Joshua Tree"). As part of its landfill development plan, Kaiser sought to exchange certain private lands for several parcels of land surrounding the mine site and owned by the Bureau of Land Management ("BLM"). Several parties, including the National Parks Conservation Association ("Conservation Association") and Donna and Laurence Charpied ("the Charpieds"), challenged the land exchange. Nevertheless, the BLM approved

the land exchange, as did the Interior Board of Land Appeals ("Appeals Board").

The Conservation Association and the Charpieds pursued challenges in district court on several grounds, including violations of the Federal Land and Policy Management Act ("Management Act") and National Environmental Policy Act ("NEPA"). The district court held for the Conservation Association and Charpieds on the Management Act claims and some, but not all, of the NEPA claims. We have jurisdiction under 28 U.S.C. § 1291 and affirm in part and reverse in part.

I. Background

Kaiser owned and operated an iron ore mine near the Eagle Mountain range in Riverside County, California from 1948 to 1983. The mine area covered over 5,000 acres and included four large open pits. The mine area also included a 429-acre "Townsite," which housed mine workers and support personnel, and over which the United States owns a reversionary interest. Though Kaiser currently leases the Townsite for use as a correctional facility, the majority of the mine site lies dormant. The disturbed lands, which contain large quantities of mine tailings, have not been reclaimed.

The BLM owns several parcels of land surrounding the former mine site. In 1989, Kaiser sought to acquire these parcels through a land exchange. Under Kaiser's proposal, Kaiser will acquire 3,481 acres of public land, the United States's reversionary interest in the Townsite, and permanent

rights-of-way over the dormant Eagle Mountain Railroad and Eagle Mountain Road. In exchange, Kaiser offered 2,846 acres of private land near other BLM lands and within an area designated as critical habitat for the desert tortoise.

Kaiser's ultimate goal is to develop the largest landfill in the United States. The proposed landfill project will cover 4,654 acres, including support and "buffer" areas. The landfill will accept solid wastes from several Southern California communities. The majority of the waste will be transported by train, though there will also be some truck and "self-haul" loads. The project is designed to operate for 117 years. At its peak, the proposed landfill will accept 20,000 tons of garbage per day, six days a week, for up to sixteen hours per day. During the final phase of the project, to commence in roughly seventy-eight years, garbage will be deposited into the largest of the four open mining pits, the East Pit. The remaining pits will not be filled. The total capacity of the proposed landfill is approximately 708 million tons.

Both Joshua Tree and the Kaiser mine site lie within a large desert wilderness area that is home to several sensitive plant and animal species, including the desert tortoise and Bighorn sheep. The proposed landfill site sits within one and-a-half miles of Joshua Tree. The landfill would be visible from remote areas of Joshua Tree.

As part of its analysis of the proposed land exchange, the BLM produced a Draft Environmental Impact Statement ("EIS"). The EIS described the

purpose and need of the project as follows:

> The primary purpose of the Project is to develop a new Class III nonhazardous municipal solid waste landfill to meet the projected long-term demand for environmentally sound landfill capacity in Southern California; provide a long-term income source from the development of a nonhazardous municipal solid waste landfill; find an economically viable use for the existing mining by-products at the Kaiser Eagle Mountain Mine site, including use of existing aggregate and overburden; and provide long-term land use and development goals and guidance for the Townsite.

With these purposes in mind, the BLM considered six alternatives in detail: (1) No action; (2) Reduced volume of waste; (3) Alternate road access; (4) Rail access only; (5) Landfill on Kaiser land only; and (6) Landfill development without Townsite development.

The BLM also commissioned an appraisal report on the proposed exchange lands from David J. Yerke, Inc. ("the Yerke appraisal"). The Yerke appraisal found that the "highest and best use" of the public lands in question was "holding for speculative investment." The appraisal explicitly stated that it did "not take into consideration any aspects of the proposed landfill project." The Yerke appraisal therefore valued the public parcels surrounding the

mine site at roughly $77 per acre and the Townsite at roughly $106 per acre.[1]The appraisal valued the Kaiser lands to be exchanged at approximately $104 per acre. The BLM subsequently required Kaiser to pay $20,100, the difference between the value of the exchanged public lands and Kaiser's parcels.

In 1997, the BLM adopted a Final EIS, incorporating the Draft EIS, and issued a Record of Decision approving the land exchange as proposed by Kaiser. The Conservation Association and Charpieds filed administrative protests with the BLM. When those protests were denied, the Conservation Association and Charpieds separately appealed to the Appeals Board. The Appeals Board affirmed the BLM's decision in a separate decision, incorporating the Draft and Final EIS, in September 1999.

The Conservation Association and the Charpieds (hereinafter, collectively "Conservation Association") filed separate complaints in the district court seeking review under the Administrative Procedure Act and alleging violations of the Management Act and NEPA. The district court consolidated the complaints. On cross-motions for summary judgment, the district court ruled in the Conservation Association's favor, in part. Looking only to the Record of Decision, the district court set aside the land exchange because: (1) the BLM did not give "full consideration" to whether the land exchange is in the

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[1] The Los Angeles County Sanitation District has since entered into a conditional agreement to purchase the landfill property and permits for over $8,800 per acre.

public interest; (2) the Yerke appraisal failed to consider a landfill as a "highest and best use"; (3) the EIS's "purpose and need" statement was too narrowly drawn, with accordingly narrow potential alternatives foreordaining landfill development; and (4) the BLM failed to take a "**hard look**" at potential impacts on Bighorn sheep and the effects of nitrogen enrichment on the nutrient-poor desert environment. This appeal followed.

II. Standard of Review

We review a grant or denial of summary judgment de novo. *Northwest Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1132 (9th Cir.2006). We may only overturn agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Great Basin Mine Watch v. Hankins,* 456 F.3d 955, 961-62 (9th Cir.2006); 5 U.S.C. § 706(2)(A).

III. Scope of Review

As a preliminary matter, we must first identify the agency action under our review. The Conservation Association argues, as the district court held, that the Record of Decision constitutes final agency action. We disagree.

Under the Administrative Procedure Act, only "final agency action" is subject to judicial review. 5 U.S.C. § 704. The BLM is part of the Department of the Interior ("DOI"). DOI regulations state that, barring a petition for a stay, a decision will become effective upon the expiration of the appeal period. 43

C.F.R. § 4.21(a)(2). If an Appeals Board fails to act upon a petition for a stay or denies such a petition, the decision becomes effective immediately. 43 C.F.R. § 4.21(a)(3). The Appeals Board's decisions, in contrast, constitute final agency action when made. "The Board [of Land Appeals] decides finally for the Department [of Interior] appeals to the head of the Department from decisions rendered by Departmental officials relating to ... [t]he use and disposition of public lands...." 43 C.F.R. § 4.1(b)(3)(i). "A decision of the Board shall constitute final agency action and be effective upon the date of issuance, unless the decision itself provides otherwise." 43 C.F.R. § 4.403.[2]

In the case before us, the Record of Decision never became effective, and cannot serve as the agency's final action. The language of the Administrative Procedure Act does not support the Conservation Association's arguments. "[A]gency action otherwise final is final ... whether or not there has been presented or determined an application for ... any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. § 704. The Conservation Association contends that no rule renders the Record of Decision inoperative during the

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[2] The Conservation Association argues that 43 C.F.R. § 4.403 applies only to Appeals Board actions, and does nothing to rob the Record of Decision of its finality. Taken to its logical conclusion, this argument would allow for two independent, and potentially conflicting, "final" agency actions. This cannot be.

pendency of the appeal, and therefore the Record of Decision is a final action. This court has held, however, that "exercise of an optional appeal to a Department ALJ renders the initial Administrator's decision nonfinal for purposes of judicial review under the APA." *Acura of Bellevue v. Reich,* 90 F.3d 1403, 1407 (9th Cir.1996). Furthermore, the Conservation Association's argument ignores the "otherwise final" language of the Administrative Procedure Act. DOI rules need not explicitly render the Record of Decision inoperative because, in a case such as that before us, the decision was never effective in the first instance. [3]

We note that in some cases, a Record of Decision may constitute final agency action. For example, where there is no administrative appeal, a Record of Decision will become effective and final following the expiration of the appeal period, in accordance with 43 C.F.R. § 4.21(a)(2). Similarly, where the Appeals

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[3] Contrary to Kaiser's suggestion, our holding is not compelled by 43 C.F.R. § 4.21(c). § 4.21(c) states:

> No decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, unless a petition for a stay of decision has been timely filed *and* the decision being appealed has been made effective ....

(Emphasis added). This subsection deals with exhaustion of administrative remedies, not finality of agency action. If taken, as Kaiser suggests, to touch upon finality of agency action, § 4.21(c)'s requirement that a petition for stay be timely filed would render all actions *not* subject to a petition for stay non-final, and thus unreviewable.

Board denies a petition for a stay, a Record of Decision will become effective and final in accordance with 43 C.F.R. § 4.21(a)(3). Indeed, this was the situation in *Desert Citizens Against Pollution v. Bisson,* 231 F.3d 1172 (9th Cir.2000). There, the Appeals Board *denied* a petition for a stay. *Id.* at 1175. This court therefore reviewed the Record of Decision as the final agency action. *See, e.g., id.* at 1182. In the case before us, in contrast, the Appeals Board *granted* a stay. The Record of Decision therefore never became effective and was not the final agency action. We reverse the district court to the extent that it limited its review to the Record of Decision. The Appeals Board decision, which incorporated the Environmental Impact Statement, is the final agency action before us for review.

IV. Federal Land and Policy Management Act Claims

Kaiser and the BLM appeal the district court's determinations that the Yerke appraisal was inadequate and that the BLM failed to give "full consideration" to whether the land exchange well serves the public interest.

A. Highest and Best Use

1. Exhaustion of Administrative Remedies

In district court, the Conservation Association challenged the BLM's appraisal of the exchange lands on the ground that the BLM failed to consider a landfill as the "highest and best use" of the public parcels. Kaiser and the BLM argue, as they did

before the district court, that the Conservation Association failed to exhaust this issue before the Appeals Board, and that this court should not review the highest and best use claim.

"As a general rule, we will not consider issues not presented before an administrative proceeding at the appropriate time." *Marathon Oil Co. v. United States,* 807 F.2d 759, 767-68 (9th Cir.1986). However, we have repeatedly held that the exhaustion requirement should be interpreted broadly. Plaintiffs fulfill the requirement if their appeal "provided sufficient notice to the [agency] to afford it the opportunity to rectify the violations that the plaintiffs alleged." *Native Ecosystems v. Dombeck,* 304 F.3d 886, 899 (9th Cir.2002). Plaintiffs need not state their claims in precise legal terms, and need only raise an issue "with sufficient clarity to allow the decision maker to understand and rule on the issue raised, but there is no bright-line standard as to when this requirement has been met." *Great Basin Mine Watch v. Hankins,* 456 F.3d at 968 (internal quotation omitted).

In the case before us, we are satisfied that the Appeals Board received sufficient notice to allow the agency to respond to the highest and best use issue. Although the Conservation Association did not use the words "highest and best use," its Statement of Reasons for appeal to the Appeals Board stated:

> THE BLM WILL NOT RECEIVE FAIR MARKET VALUE FOR THE EXCHANGE. Any disposal of federal lands must be compensated at "fair market value of the use

> of public lands and their resources." 43 U.S.C.A. § 1701(a).... Kaiser will also pay BLM a lump sum of $20,100, which is below the *fair market value.* Kaiser anticipates huge profits *from a landfill operation* on the undervalued BLM land. . . .

(emphasis added). In their separate Statement of Reasons, the Charpieds argued that "the public should receive fair appraisal for its lands," and "[n]ot an appraisal that has been artificially reduced in value through instructions to discount developments, improvements, and recent zoning changes."

These statements adequately raised the highest and best use issue before the Appeals Board.[4] The Yerke appraisal explicitly states that it does not consider any aspect of the landfill project. The Conservation Association's Statement of Reasons highlighted the BLM's failure to appraise the land's fair market value *as a landfill.* The highest and best use analysis is an integral part of the appraisal process. 43 C.F.R. § 2201.3-2(a)(1) ("In estimating

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[4] The dissent finds language such as "appraisers failed to consider that the Federal land to be exchanged is proposed to be used as a landfill, and that, as a result, the land should be valued ... in comparison to landfill sites" satisfactory to exhaust the highest and best use issue. Dissent at 1096 (quoting *Donna Charpied,* 137 IBLA 45, 47 (1996)). We see no meaningful distinction between this language and that presented in the case before us, which highlights that Kaiser will reap profits "from a landfill operation," will pay "below the fair market value," and that the appraisal unfairly ignored development and zoning changes.

market value, the appraiser shall: (1) Determine the highest and best use of the property to be appraised[.]"). Under such a backdrop, the Appeals Board had sufficient notice to address the highest and best use issue.

2. Merits of the Highest and Best Use Claim

The statutory and regulatory requirements governing appraisals are numerous. The Management Act requires the BLM to appraise lands before agreeing to a land exchange. 43 U.S.C. § 1716(d)(1). This appraisal must set forth an opinion regarding the market value of the lands "supported by the presentation and analysis of relevant market information." 43 C.F.R. § 2200.0-5(c). Market value "means the most probable price ... that lands or interests in lands should bring in a competitive and open market ... where the buyer and seller each acts prudently and knowledgeably." 43 C.F.R. § 2200.0-5(n). "In estimating market value, the appraiser shall: (1) Determine the highest and best use of the property to be appraised"; and "(2) Estimate the value of the lands and interests as if in private ownership and available for sale in the open market." 43 C.F.R. § 2201.3-2(a)(1)-(2). "Highest and best use means the most probable legal use of a property, based on market evidence as of the date of valuation, expressed in an appraiser's supported opinion." 43 C.F.R. § 2200.0-5(k).

The appraisal must also comply, to the extent appropriate, with the separate requirements of the Uniform Appraisal Standards for Federal Land Acquisitions. 43 C.F.R. § 2201.3. Under the Uniform

Appraisal Standards definition, highest and best use is " '[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future.' " The Appraisal Institute, Uniform Appraisal Standards for Federal Land Acquisitions 34 (quoting *Olson v. United States,* 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236 (1934)), *available at* http:// www. usdoj. gov/enrd/land-ack/yb2001.pdf. While Department of Interior regulations define highest and best use as the "most probable" use of land, the Uniform Standards only require "reasonable probability" of a given use. Uniform Standards at 34; *Desert Citizens,* 231 F.3d at 1181 n. 10. Under the Uniform Standards, the highest and best use must also be: (1) physically possible; (2) legally permissible; (3) financially feasible; and (4) must result in the highest value. Uniform Standards at 17.

In *Desert Citizens,* we examined a highest and best use claim almost identical to that presented in the instant case. *Desert Citizens,* 231 F.3d at 1175, 1180. In *Desert Citizens,* a mine operator proposed a land exchange to the BLM in connection with the development of the Mesquite Regional Landfill on and near the Mesquite Mine. *Id.* at 1175. An appraisal of the public lands concluded that the highest and best use was "open space" or "mine support." *Id.* At the time of the appraisal, the mine operator had already applied for county permits to build the landfill. *Id.* The district court upheld the appraisal on the grounds that there was no market demand for a landfill and that landfill development was an expensive, risky venture. *Id.* at 1180.

We reversed. After analyzing the statutory and regulatory framework regarding highest and best use, we held that "uses that are reasonably probable must be analyzed as a necessary part of the highest and best use determination. This analysis must have due regard for the existing business or wants of the community, or such needs as may be reasonably expected to develop in the near future." *Id.* at 1181 (internal quotations and citations omitted). We observed that because the lands in question "were expected to be used for landfill purposes" and because the "existence of other landfill proposals in the region indicated a general market for landfill development," landfill use was reasonably probable and must "*at the very least* " have been considered in the highest and best use analysis. *Id.* (emphasis added).

We then proceeded to analyze the physical, legal, and financial feasibility of the proposed Mesquite Landfill, in accordance with the Uniform Appraisal Standards. *Id.* at 1184. In our discussion of financial feasibility, we held that "a regional market and the presence of competitors sponsoring similar projects made reasonably probable, prior to the ... appraisal, that use of the lands for landfill purposes was financially feasible." *Id.* at 1185. Among the other landfill proposals we relied upon as evidence of market demand was the "Eagle Mountain Regional Landfill proposed by Kaiser." *Id.*

The facts of *Desert Citizens* are virtually identical to the facts before us in the instant case. Kaiser applied for county permits before the Yerke appraisal was drafted. The Yerke appraisal was clearly cognizant of Kaiser's proposal, yet explicitly stated

that it was not taking "into consideration any aspect of the proposed landfill project." Kaiser and the BLM do not contest the physical or legal feasibility of constructing a landfill at the Eagle Mountain site. As for financial feasibility, we held in *Desert Citizens* that the presence of competing proposals alone is sufficient to establish market demand and financial feasibility. *Id.* If the Kaiser landfill proposal was sufficient to establish a reasonable probability of the Mesquite Landfill's financial feasibility, the Mesquite Landfill and other proposals must demonstrate similar feasibility of the Kaiser project.

The BLM tries to distinguish *Desert Citizens* by arguing that here, BLM market analyses did not show that there were other landfill proposals in the area, and therefore there is no evidence of market demand. This argument distorts the facts of *Desert Citizens* and misses the point entirely. Contrary to the BLM's assertions, in *Desert Citizens* we did not look to the BLM's own market analyses for proof of market demand. To the contrary, the BLM's position, as articulated by the district court, was that market demand did not exist. *Id.* at 1180. In reversing this determination, we looked not to any BLM market analysis, but rather to the obvious and well-known presence of competing landfill proposals. *Id.* at 1185. Indeed, we found the appraiser's willful ignorance of facts of "general notoriety" "particularly troubling." *Id.* at 1182.

Kaiser and the BLM have failed to distinguish

the facts of this case from those of *Desert Citizens*.[5]

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[5] Kaiser and the BLM rely heavily on a 2002 report compiled by the Herzog Group as part of the litigation of this case. This report was not before either the BLM or the Appeals Board. Accordingly, we do not consider it here. *See, e.g., Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir.2006) ("Parties may not use post-decision information as a new rationalization either for sustaining or attacking the Agency's decision." (internal quotation omitted)).

The dissent erroneously concludes that the Herzog "appraisal" cured any deficiency in the Yerke appraisal, and that we should therefore consider the Herzog report under our decision in Friends of the Clearwater v. Dombeck, 222 F.3d 552 (9th Cir.2000). Dissent at 1098-99. In Dombeck, we considered supplemental materials presented after the onset of litigation where a remand would be pointless because a court "could not order the [agency] to conduct studies already completed to answer questions the [agency] already answered on a basis that could not be successfully challenged." Id. at 560 (internal quotation omitted). Kaiser argues that (1) the Herzog report did consider highest and best use, as required by our decision in Desert Citizens, (2) the BLM has rendered a final decision accepting the Herzog analysis, and (3) the Conservation Association failed to appeal that "decision."

First, we note that Dombeck concerned a NEPA violation, whereas here we examine a Management Act violation. Dombeck also specifically distinguished suits to compel agency action from challenges, such as that before us here, to a final agency action. Regardless of these distinctions, Dombeck is inapplicable because the record does not demonstrate that the BLM has cured the defects of the Yerke appraisal on a basis that is immune to challenge. Kaiser points to, and the dissent apparently relies upon, a letter from a BLM district manager to the State Director in which the district manager favorably references the Herzog report in the course of reiterating that the land exchange well serves the public interest. This letter hardly establishes that the BLM has cured the Management Act deficiencies of the Yerke appraisal "on a basis that could not be

As such, the highest and best use analysis should have taken the reasonably probable use of public lands for a landfill into consideration as part of the highest and best use analysis. As we stated in *Desert Citizens:*

> [T]he use of the land as a landfill was not only reasonable, it was the specific intent of the exchange that it be used for that purpose. There is no principled reason why the BLM, or any federal agency, should remain willfully blind to the value of federal lands by acting contrary to the most elementary principles of real estate transactions.

231 F.3d at 1184. We therefore affirm the district court's grant of summary judgment on the highest and best use claim under the Management Act.

B. The Public Interest Determination

Under the Federal Land Policy and Management Act, the BLM must determine that "the public interest will be well served" by a land exchange before approving such an exchange. 43 U.S.C. § 1716(a); *see also* 43 C.F.R. § 2200.0-6(b). This determination "shall give full consideration to better

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successfully challenged." There is nothing in the record to indicate that the BLM has rendered a final, appealable decision on an appraisal that properly considers landfill use as a highest and best use. Dombeck therefore does not apply, and we do not consider the 2002 Herzog report.

Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas ... and fish and wildlife ...." 43 U.S.C. § 1716(a). A determination that an exchange well-serves the public interest must be predicated on a finding that:

> (1) The resource values and the public objectives that the Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the resource values of the non-Federal lands or interests and the public objectives they could serve if acquired,[6] and (2) The intended use of the conveyed Federal lands will not, in the determination of the authorized officer, significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands. Such finding and the supporting rationale shall be made part of the administrative record.

43 C.F.R. § 2200.0-6(b).

The Management Act does not define the term "full consideration." Our review is thus limited to the question whether the BLM's interpretation of the term is based on a permissible construction of the statute. *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council,* 467 U.S. 837, 843, 104 S.Ct. 2778, 81

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[6] In other words, the BLM must find that the resource values of the public land being conveyed do not outweigh the resource values of the private land being acquired.

L.Ed.2d 694 (1984). We review the entire record to determine whether the agency's decision was based on a reasonable consideration of the relevant factors. *Hjelvik v. Babbitt,* 198 F.3d 1072, 1074 (9th Cir. 1999).

The district court's analysis was constrained by its decision to review only the Record of Decision. Having held that the Appeals Board's decision, which incorporates the EIS, is the final agency action under review, we examine a broader set of materials than did the district court. The Final EIS alone includes over 1,600 pages of material not considered by the district court, including detailed environmental analyses. Though we do not necessarily agree with the BLM's public interest determination, the record as a whole establishes that the BLM's interpretation of "full consideration," as evinced by the analyses in the EIS, is permissible under 43 U.S.C. § 1716(a).[7] Accordingly, we reverse the district court's determination on this issue.

V. National Environmental Policy Act Claims

The National Environmental Policy Act requires federal agencies to prepare an Environmental Impact Statement discussing, among other things, the environmental impact of a proposed action, any

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[7] In agreeing with this conclusion, the dissent quotes several examples of these sufficient Management Act public interest analyses, albeit in the context of a separate "purpose and need" issue under the National Environmental Policy Act. Dissent at 1079-84.

adverse environmental effects which cannot be avoided, and alternatives to the proposed action. 42 U.S.C. § 4332(2)(C). In addition, implementing regulations require that the agency state the underlying purpose and need for the proposed action. 40 C.F.R. § 1502.13. Kaiser and the BLM appeal the district court's holding that the EIS was deficient with respect to purpose and need, reasonable alternatives, impacts on Bighorn sheep, and eutrophication.[8]

A. Purpose and Need and Reasonable Alternatives

Agencies enjoy "considerable discretion" to define the purpose and need of a project. *Friends of Southeast's Future v. Morrison,* 153 F.3d 1059, 1066 (9th Cir.1998). However, "an agency cannot define its objectives in unreasonably narrow terms." *City of Carmel-By-The-Sea v. United States Dep't. of Transp.,* 123 F.3d 1142, 1155 (9th Cir.1997). As the *Friends* court stated, "An agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." *Friends,* 153 F.3d at 1066 (quoting *Citizens Against Burlington, Inc. v. Busey,* 938 F.2d 190, 196

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[8] Eutrophication, in this context, refers to the introduction of nutrients to the desert environment. The eutrophication discussion in this case focuses on two potential pathways: (1) landfill waste material; and (2) nitrogenbearing airborne emissions.

(D.C.Cir.1991), *cert. denied,* 502 U.S. 994, 112 S.Ct. 616, 116 L.Ed.2d 638 (1991)) (correction in original). We evaluate an agency's statement of purpose under a reasonableness standard. *Id.* at 1066-67.

In the case before us, the purpose and need statement reads:

> The primary purpose of the Project is to develop a new Class III nonhazardous municipal solid waste landfill to meet the projected long-term demand for environmentally sound landfill capacity in Southern California; provide a long-term income source from the development of a nonhazardous municipal solid waste landfill; find an economically viable use for the existing by-products at the Kaiser Eagle Mountain Mine site, including use of existing aggregate and overburden; and provide long-term land use and development goals and guidance for the Townsite.

The Conservation Association contends, and the BLM does not dispute, that the majority of these purposes and needs respond to Kaiser's goals, not those of the BLM. Other circuits have held that agencies must acknowledge private goals. *Colorado Envtl. Coalition v. Dombeck,* 185 F.3d 1162, 1175 (10th Cir.1999) ("Agencies ... are precluded from completely ignoring a private applicant's objectives."); *Burlington,* 938 F.2d at 196 ("[T]he agency should take into account the needs and goals of the parties involved in the application."). Requiring agencies to consider private objectives, however, is a far cry from

mandating that those private interests define the scope of the proposed project. Instead, as the *Burlington* court held:

> [A]gencies must look hard at the factors relevant to the definition of purpose.... Perhaps more importantly [than the need to take private interests into account], an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives.

Id. We agree.

Burlington does not conflict with our decision in *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir.1986). In *Angoon*, a private party sought a federal permit to build a log-transfer facility on its own lands. *Id.* at 1019. As part of an EIS, the Army Corps of Engineers ("the Corps") identified a purpose and need to provide a "safe, cost effective means of transferring timber harvested on [the privately owned] land." *Id.* at 1021. The district court eliminated the private land specification, and restated the purpose and need as "commercial timber harvesting." *Id.* We reversed, rejecting the district court's "broad social interest" formulation in favor of the Corps's "more balanced" statement. *Id.*

Angoon is distinguishable from the situation in the case before us. In *Angoon*, the issue was whether the Corps should issue a permit. *Id.* at 1017-18. As discussed above, agencies must look hard at the

factors relevant to definition of purpose. In *Angoon*, those factors included a regulatory framework far different from that guiding the BLM here. The relevant Corps regulations in *Angoon* explicitly stated that "every application has both an applicant's purpose and need and a public purpose and need" and specified that a Corps EIS must document alternatives "which would satisfy the purpose and need ... *for which the applicant has submitted his proposal*." *Id.* at 1021 (citing 33 C.F.R. pt. 230, App. B(11)(b)(4)-(5) (1985) (emphasis added)). We therefore held that the Corps's purpose and need statement, which emphasized private goals, reasonably balanced the relevant factors. *Id.*

In contrast, the Department of Interior has promulgated no regulations emphasizing the primacy of private interests. The DOI analogue to the Corps's regulation, 40 C.F.R. § 1502.13, merely requires that an EIS "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." Furthermore, DOI's current NEPA guidelines take the exact opposite approach to that of the Corps regulations in *Angoon*. DOI's NEPA handbook explains that the "purpose and need statement for an externally generated action must describe the BLM purpose and need, *not an applicant's or external proponent's purpose and need*." Department of Interior, Bureau of Land Management, National Environmental Policy Act Handbook 35, (citing 40 C.F.R. § 1502.13) (emphasis added), available at http:// www. blm. gov/ pgdata/ etc/ medialib/ blm/ wo/ Information_ Resources_ Management/ policy/blm_ handbook. Par. 24487. File. dat/ h1790-1-2008-1.pdf

(citing 40 C.F.R. § 1502.13) (emphasis added). "The applicant's purpose and need may provide useful background information, but this description must not be confused with the BLM purpose and need for action.... It is the BLM purpose and need for action that will dictate the range of alternatives...." *Id.*

The BLM's definition of the project's purpose will necessarily affect the range of alternatives considered, because when "the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved." *Angoon,* 803 F.2d at 1021. Our task is to determine whether the BLM's purpose and need statement properly states the BLM's purpose and need, against the background of a private need, in a manner broad enough to allow consideration of a reasonable range of alternatives. In the case before us, the purpose and need statement sets out four goals: (1) to meet long-term landfill demand; (2) to provide a longterm income source from a landfill; (3) to find a viable use for mine byproducts; and (4) to develop long-term development plans for the Townsite. The first, to meet long-term landfill demand, is unquestionably a valid BLM purpose. The remaining three goals, however, can hardly be characterized as BLM needs. Kaiser and its successors in interest, not the BLM, will be the recipient of any long-term income from the landfill. Kaiser may desire to find a viable use for mine by-products located on its private land holdings, but the BLM has no need to do so. Kaiser, not the BLM, currently operates the Townsite, in which it stands to receive a fee interest, and would be the beneficiary of any long-term development plans.

The purpose and need statement, though it includes one BLM goal, also sets out three private objectives as defining characteristics of the proposed project. Such a narrowly drawn statement necessarily and unreasonably constrains the possible range of alternatives. The BLM considered only six alternatives in detail: (1) No action; (2) Reduced volume of waste; (3) Alternate road access; (4) Rail access only; (5) Landfill on Kaiser land only; and (6) Landfill development without Townsite development. All of these options, save the No Action alternative, would result in landfill development of some sort and would require some portion of the land exchange to occur.

The BLM proposed several alternatives that would have been responsive to the need to meet long-term landfill demand, such as a landfill on other Kaiser property, waste diversion, offsite landfill locations, landfill mining, alternative Townsite locations, and alternative Townsite uses. The BLM did not, however, consider these options in any detail because each of these alternatives failed to meet the narrowly drawn project objectives, which required that Kaiser's private needs be met.

Our holdings in *Friends* and *Carmel-By-The-Sea* forbid the BLM to define its objectives in unreasonably narrow terms. The BLM may not circumvent this proscription by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives, yet that was the result of the process here. The BLM adopted Kaiser's interests

as its own to craft a purpose and need statement so narrowly drawn as to foreordain approval of the land exchange.[9] As a result of this unreasonably narrow purpose and need statement, the BLM necessarily considered an unreasonably narrow range of alternatives. We therefore affirm the district court's grant of summary judgment on both the "purpose and need" and "reasonable range of alternatives" claims under NEPA.

B. Bighorn Sheep

Under NEPA, an EIS must contain a "reasonably thorough" discussion of an action's environmental consequences. *State of California v. Block,* 690 F.2d 753, 761 (9th Cir.1982). An EIS must "provide full and fair discussion of significant environmental impacts." 40 C.F.R. § 1502.1. Our review is limited to whether an EIS took a "**hard look**" at the environmental impacts of a proposed action. *Id.* We must make a "pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation." *Block,* 690 F.2d at 761.

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[9] The dissent conflates two unrelated issues: (1) adequacy of the purpose and need statement under NEPA and (2) adequacy of the public interest determination under the Management Act. Dissent at 1082-83. Whether the BLM gave full consideration to public interest factors, however, has no bearing on the sufficiency of the EIS under NEPA. The dissent concludes that so long as the BLM properly concluded that the project is in the public interest, there is no NEPA violation-that is, that the ends justify the means. We disagree.

Contrary to the district court's conclusion, we find that the EIS contains extensive analyses of potential impacts on Bighorn sheep, including migration patterns, habitat loss, and water accessibility. The district court cited two particular deficiencies with respect to Bighorn sheep. The district court found that the EIS did not address the potential impact of tortoise-proof fencing on sheep migration patterns and failed to specify what a proposed "buffer zone" would entail.

The EIS does, however, contain the information the district court believed was missing.[10] The EIS includes a 56-page report on Bighorn sheep. The report is based on an extensive monitoring study, utilizing sheep capture, radio telemetry, and genetic testing methods. The EIS states that any installed tortoise-proof fencing will be designed to allow for sheep movement.[11] The EIS explains that the buffer zone constituting "644 acres of potential habitat would remain as natural open space around the periphery of the proposed landfill. This habitat would provide a buffer zone between the landfill operation and relocated sheep population."[12] Though the EIS does not "exactly specify" what the buffer zone

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[10] The Final EIS incorporated the earlier Draft EIS.

[11] Other evidence in the record indicates that fencing of this type is eighteen inches high; high enough to restrict tortoise movement but low enough to present no obstacle to Bighorn sheep.

[12] The Riverside County Specific Plan clarifies that the 644 acre area will provide a buffer between sheep and the *footprint* of the landfill.

entails, it does contain a "reasonably complete" discussion of this mitigation measure. *See Okanogan Highlands Alliance v. Williams,* 236 F.3d 468, 473 (9th Cir.2000) (holding that an EIS must include a "reasonably complete discussion of possible mitigation measures."). We are not authorized to substitute our judgment for that of the agency. *Block,* 690 F.2d at 761. Having concluded that the BLM did take a "**hard look**" at Bighorn sheep, our review is at an end. *Id.* We reverse the district court on this issue.

C. Eutrophication

We apply the same analysis to the district court's conclusion that the EIS insufficiently addressed the potential for eutrophication, or introduction of nutrients into the desert environment. Unlike its discussion of Bighorn sheep, the EIS contains no specific discussion of eutrophication. The BLM argues that the relevant discussion is present in other, scattered sections of the EIS. The EIS does, for example, discuss "Biological Resources" and "Air Quality." The "Biological Resources" section discusses mitigation measures, such as daily cover of the working face of the landfill, that will reduce "increased food availability." The same "Biological Resources" section references a separate "Air Quality" section, which calculates potential levels of nitrate production, to support the conclusion that atmospheric nitrate deposition resulting from landfill operations will be dwarfed by other sources in the Los Angeles Basin. The EIS therefore concludes that nitrate deposition from landfill sources will have no effect on Joshua Tree's ecosystem.

In determining whether an EIS fosters informed decision-making and public participation, we consider not only its content, but also its form. *Block*, 690 F.2d at 761. Here, the discussion of eutrophication is neither full nor fair with respect to atmospheric eutrophication. A reader seeking enlightenment on the issue would have to cull through entirely unrelated sections of the EIS and then put the pieces together. To find the brief discussion of atmospheric eutrophication, a reader must begin in the "Biological Resources" section, which then refers to data from the "Air Quality" section, and then with respect to effects only on Joshua Tree, not the surrounding area. Rather than address eutrophication up front, the BLM instead attempts to cobble together a "hard look" from various other analyses as varied as air quality and disease vector control. This patchwork cannot serve as a "reasonably thorough" discussion of the eutrophication issue.[13] We therefore affirm the

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[13] The dissent's contention that eutrophication is "*not* a serious issue" is at odds with the analysis of both the National Park Service and the IBLA. The National Park Service found the eutrophication issue sufficiently serious as to merit an official comment, as the dissent itself points out. Dissent at 1087-88. The IBLA did not take the position that eutrophication is unimportant, but instead concluded that the EIS adequately took a "hard look" at the issue.

The dissent contends that the EIS contains a "map" to the eutrophication issue that is sufficient to meet the "hard look" requirement." Dissent at 1087-88. Whether the dissent or a reviewing court, examining an EIS with the benefit of law clerks and post-hoc rationalizations from counsel, is able to follow a tortuous map to the buried treasure of a eutrophication discussion is not the question. In examining an EIS, we must make a "*pragmatic* judgment whether the EIS's form, content

district court's decision on this NEPA claim.

VI. Cross-Appeal

The Charpieds cross-appeal the district court's determination that they lacked standing to pursue their claim against the National Park Service ("Park Service") under NEPA, the National Park Service Organic Act, 16 U.S.C. § 1, and the California Desert Protection Act, 16 U.S.C. § 410aaa, *et seq.* The Charpieds also appeal the district court's grant of summary judgment to Kaiser and the BLM on NEPA claims concerning the EIS's sufficiency regarding desert tortoises, visual, noise, and night lighting impacts, groundwater, and air quality. We affirm the district court on all issues on cross-appeal.

Although the BLM was required to solicit the Park Service's input on the EIS, 40 C.F.R. § 1503.1, the BLM did not need the Park Service's approval to complete the land exchange. The Park Service was involved in the Kaiser proposal only as a cooperating agency. NEPA regulations distinguish lead agencies from cooperating agencies. 40 C.F.R. § 1501.6. Cooperating agencies must, at the request of the lead agency, help prepare environmental analyses, including portions of the EIS. *Id.* In October 1996 the Park Service recommended that the BLM reject the Kaiser proposal and stated that the Draft EIS did not

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and preparation foster both informed decision-making and informed public participation." *Block*, 690 F.2d at 761 (emphasis added).

sufficiently address certain environmental impacts. In December 1996 the Park Service changed its position, and supported the EIS and Kaiser proposal.

Standing requires three elements: (1) actual or imminent injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) likelihood that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The Charpieds argue that the Park Service's reversal constituted a procedural violation under NEPA, the California Desert Protection Act, and the National Park Service Organic Act, and that relaxed standards of redressability should apply. *See Lujan*, 504 U.S. at 572 n. 7, 112 S.Ct. 2130. The Charpieds, however, have not identified any violation of a procedural duty by the Park Service.[14] The relaxed standard therefore does not apply. A favorable decision would not redress the injury complained of because the Park Service is not the lead agency responsible for approving the Kaiser project. Even if the Park Service were to rescind its approval of the landfill project, the BLM, as the lead agency, would be free to move forward. Accordingly, we affirm the district court's holding that the Charpieds lack standing under NEPA, the National Park Service Organic Act, and the California Desert Protection Act.

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[14] To the extent that the Park Service may have assumed a contractual duty to assist the BLM, the Charpieds cannot demonstrate that they are third party beneficiaries.

Lastly, we briefly address the Charpieds' impact-specific NEPA claims. As discussed above, our review is limited to whether the EIS took a "**hard look**" at the landfill's potential environmental impact. *Block*, 690 F.2d at 761. In challenging the EIS's discussion of desert tortoises, visual, noise, and night lighting impacts, groundwater, and air quality, the Charpieds take issue with the EIS's methodology and ultimate conclusions. Without taking a position on those conclusions, we find that the EIS's discussion of these issues is sufficient to foster informed decision-making and public participation. We therefore affirm the district court's grant of summary judgment on these NEPA claims, as well as its dismissal of the Charpieds' complaint against the Park Service.

VII. Conclusion

The judgment of the district court is **AFFIRMED** in part and **REVERSED** in part. This case is **REMANDED** for further proceedings consistent with this opinion. Each side shall bear its own costs on appeal.

TROTT, Senior Circuit Judge, dissenting:

What sane person would want to attempt to acquire property for a landfill? Our well-meaning environmental laws have unintentionally made such an endeavor a fool's errand. This case is yet another example of how daunting-if not impossible-such an adventure can be. Ulysses thought he encountered fearsome obstacles as he headed home to Ithaca on

the Argo, but nothing that compares to the "due process" of unchecked environmental law. Not the Cyclops, not the Sirens, and not even Scylla and Charybdis can measure up to the obstacles Kaiser has faced in this endeavor. The record here exceeds 50,000 pages. At the beginning, Kaiser had a partner, Browning-Ferris Industries ("BFI"), but BFI-a company experienced in the field of solid waste disposal-dropped out after investing $45 million in the project with nothing to show for it in return. I agree with my colleagues insofar as they dispense with the cross-appeal and the public interest and bighorn sheep issues, but I dissent with respect to the rest. The final irony is that my colleagues send the case back to the Bureau of Land Management ("BLM") to do something BLM has already adequately done: consider the value of the land involved as a commercial landfill.

I

BACKGROUND

Kaiser's proposed landfill formally began in 1989-20 years ago-when it filed an application with BLM for a land exchange to facilitate the construction of what it called the Eagle Mountain Landfill. From 1948 to 1983, Kaiser had operated an iron ore mine on 5,000 isolated acres of land it owned or controlled in Riverside, California. In 1989, Kaiser sought to acquire federal lands as part of an exchange that would facilitate the Eagle Mountain project. The landfill would have been the first to comply with new Environmental Protection Agency guidelines. The federal land Kaiser sought mostly encircled the spent

mines. Sixty percent of the targeted federal land is classified as mountainous. Kaiser in turn offered 2,846 acres of mostly flat desert land to become part of the California Desert Conservation Area located about 1.5 miles from the border of Joshua Tree Natural Park ("JTNP"), and twenty miles from the park's nearest visitor center. The proposed landfill would accept municipal, non-hazardous, solid waste from seven Southern California counties, to be delivered mostly by train.

In 1994, the State Superior Court in San Diego County further described this project as follows:

> "[Kaiser's] mining operation resulted in the excavation of three large open pits; each[ ] one to two miles long. The mining operation ceased in 1983, and Kaiser has leased the mine site to the prospective operator of the landfill.
>
> "[Kaiser/Mine Reclamation Corp.] plans to utilize the open pits left from the mining operation to create what all parties have agreed is the largest landfill in the country. The landfill footprint will encompass approximately 2,262 acres within a larger project area of 4,654 acres. The landfill will have the capacity to accept up to 20,000 tons per day of wastes for a minimum of 115 years.
>
> "The landfill will receive most of the waste from Los Angeles and other Southern California counties. Ninety percent of the garbage will be shipped by rail and the

> balance by truck. All waste will be delivered after processing at materials recovery facilities (MRF's) which accept delivery of trash from homes and businesses and compact the waste into containers for transportation.
>
> "The landfill accepts only nonhazardous solid waste and inert wastes that have been processed through MRFs. The Draft EIR states a typical MRF would require about 10 to 30 acres and an enclosed structure of about 100,000 square feet. [ ] The garbage is delivered to the MRF by truck and dumped on the floor of the structure. Workers sort through the waste and remove unacceptable materials such as hazardous waste, sewage sludge, radioactive, biological or infectious waste, and other materials needing special handling. Recyclable materials may be recovered. The remaining wastes are compacted and packaged into containers that hold up to 25 tons each and then loaded onto rail cars, each of which holds 10 containers. The containers are then transported to the landfill. [ ] Approximately 10 percent of the wastes will be transported by truck rather than rail."

Nat'l Parks & Conservation Ass'n v. County of Riverside, 42 Cal.App.4th 1505, 50 Cal.Rptr.2d 339, 342 (1996).

I do an injustice to the record by attempting to summarize the legal hurdles Kaiser has negotiated in

its thus-far vain attempt to accomplish its goals-at a cost now in excess of $50,000,000-but here goes.[1]

First, the permits. After a lengthy public hearing process, Riverside County issued all local land use approvals, including a zoning change. Then, California's South Coast Air Quality Management District approved permits for air emissions from the project. Next the United States Fish and Wildlife Service evaluated the potential impacts of the project on threatened or endangered species and thrice issued a "no jeopardy" opinion. The permits were approved only after searching inquiries by the issuing agencies. All the environmental laws were addressed.

Then, the matter turned into a lawsuit in state court. *See Nat'l Parks & Conservation Ass'n v. County of Riverside,* 71 Cal.App.4th 1341, 84 Cal.Rptr.2d 563 (1999). *Two* Superior Court trials later, and after the Draft EIS/EIR had been redone, the California Court of Appeal ruled that Riverside County and BLM had adequately addressed all environmental concerns under California law. This was the *second* state appeal in this dispute. In many respects, California's environmental laws are more demanding than their

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[1] I apologize to the reader for including extensive parts of the record in my opinion, but the record-overlooked in large measure in the majority's opinion and the district court-is what this case is all about. Unfortunately, the huge excerpt of record will not be routinely circulated to the rest of the Ninth Circuit in connection with an en banc call, so it is here that I must prove the validity of my conclusions.

federal counterparts.

Moreover, Kaiser had actively engaged the National Park Service ("NPS") in an ongoing process designed to protect Joshua Tree National Park. As described by the Interior Board of Land Appeals ("IBLA"), the agreement reached "gives NPS precisely what they had requested as early as 1992-a comprehensive, long-term monitoring and mitigation program, which runs for the life of the project and is specifically tailored to detect and to address any unforeseen impacts on JTNP." This is how the IBLA described the National Park Service's involvement:

> When the decision was made [in 1995] to prepare the new EIS/EIR, BLM invited the NPS to participate as a "cooperating agency" in the preparation of the new document-a role that would recognize NPS' special expertise in evaluating impacts on the newly designated JTNP.
>
> At the scoping stage, the NPS submitted a 12-page letter outlining issues that it wanted to see addressed in the EIS/EIR. With the assistance of the consultant preparing the EIS/EIR, BLM reviewed these issues one by one, held a series of meetings with the NPS staff, and incorporated many of the NPS's recommendations into the Draft EIS/EIR. Before the Draft EIS/EIR was issued, BLM provided an "administrative draft" of the document to NPS for review, and the NPS provided more than 150 pages of comments. Again, BLM responded point by point to

NPS's comments in a 34-page response. BLM accepted many of the NPS's recommendations and provided detailed explanations for those it declined to accept. When the Draft EIS/EIR itself was issued, the NPS submitted a third round of comments, even more detailed than the last. Again, BLM painstakingly reviewed the NPS's comments and addressed each of them.

As the new EIS/EIR was being prepared, the NPS again raised the issue of the project's potential unknown and unpredictable impacts, as it had in 1992. To address this concern, [Kaiser] MRC revived an idea that the NPS itself had proposed during preparation of the first EIS/EIR-namely, entering into an agreement that would establish a long-term mitigation and monitoring program. Over the next 18 months, MRC and the NPS engaged in extensive discussions to develop a detailed, enforceable agreement. In the end, MRC and NPS entered into a binding agreement that gives NPS precisely what they had requested as early as 1992-a comprehensive, long-term monitoring and mitigation program, which runs for the life of the project and is specifically tailored to detect and address any unforeseen impacts on JTNP. While the NPS made it clear that it would prefer to avoid any industrial-type activity at the mine site, the agency agreed that if the landfill project were to go forward, the agreement with MRC provided the appropriate safeguards for

> addressing NPS's concerns about any gradual, long-term impacts (which cannot be accurately predicted).

(quotation omitted).

Furthermore, a Technical Advisory Panel composed of eminent scientists and engineers from major California Universities was called in to look at the project and concluded:

> "[T]he designers have done essentially all that is humanly possible to make this a safe landfill that will be protective of ... the underlying and surrounding environment. Given the favorable site conditions, sophisticated waste containment systems, and elaborate monitoring systems, *the proposed Eagle Mountain Landfill could well become one of the world's safest landfills and a model for others to emulate.*

(emphasis added).

County officials similarly noted that Kaiser had "overdone its mitigation" and had "bent over backwards in addressing all of the impacts which have been brought up by previous commissions, by the courts, by our staff, and by this particular commission."

The final Environmental Impact Statement prepared for this project consists of (1) a 900-page Draft EIS ("DEIS"), which details the potential environmental impacts of the project, the range of

alternatives that were considered, and proposed mitigation, and (2) a 1600-page Final EIS ("FEIS"), produced following extensive and exhaustive public comment on the DEIS. The required National Environmental Policy Act ("NEPA") documents were issued jointly by the BLM and Riverside County in 1996, 13 years ago. In 1999, the IBLA issued a thirty-two page opinion affirming BLM's decisions.

But, we are just getting started. The same plaintiff who lost in state court filed this federal lawsuit, in 1999-10 years ago. The case took over five years in district court simply *to get to summary judgment!* It took the court *three years* to rule on the completed motions, and, here we are at the end of 2009, another five years later, burdened by a seriously flawed district court opinion, hitting the reset button, and unnecessarily sending the parties back to a Sisyphean hill which cannot be climbed in a lifetime-ten years after the IBLA's opinion. How many of the people who started this project are still employed by Kaiser, are still in public service, or for that matter, are still alive? Yet, the *process* has developed an eternal life of its own as full-employment for all swept along with or by it.

Now, in an opinion that is not only not supported by the record, but irreconcilable with it, the endless process continues. No doubt we will see this case back again, years from now, unless the proponents of this project-including seven California counties-weary of it and throw in the towel, thwarted and defeated not by substance, but by interminable process.

II

PURPOSE AND NEED/PUBLIC INTEREST/CONSIDERATION OF ALTERNATIVES

A.

Purpose and Need

My colleagues' opinion concluding that BLM's Statement of Purpose and Need for the project is defective completely misunderstands the purpose of this requirement in a setting where a private entity approaches a government entity with a joint proposal that will benefit both. Of course there is a private purpose driving this project. But the project benefits *both* parties, not just Kaiser. To isolate one without factoring in the other is patently illogical. To illustrate the folly of this fallacy, all one has to do is examine the IBLA's opinion outlining the habitat benefits of this exchange to fish and wildlife and threatened and endangered species. Here, however, is how BLM's goal reads in the Introduction of the Draft EIS/EIR:

> **1.3.1 Project Purpose and Need**
>
> The primary purpose of the Project is to develop a new Class III nonhazardous municipal solid waste landfill to meet the projected long-term demand for environmentally sound landfill capacity in Southern California; provide a long-term income source from the development of a

nonhazardous municipal solid waste landfill; find an economically viable use for the existing mining by-products at the Kaiser Eagle Mountain Mine site, including use of existing aggregate and overburden; and provide long-term land use and development goals and guidance for the Townsite.

Several recent studies documenting the need for additional landfill capacity in Southern California indicate that additional capacity is needed to meet the long-term demands (i.e., 1995 to 2050) and possible short-term needs (i.e.1995 to 2000) of the Southern California region (California Integrated Waste Management Board [CIWMB],1992; CIWMB, 1994, Draft Countywide Siting Elements-for the seven counties viewed as potential sources of waste for the proposed landfill-1995 and 1996). Additional capacity is also required for counties and municipalities in Southern California to satisfy the legal requirements of AB 939 to demonstrate adequate waste disposal capacity. The solid waste capacity in southern California changes often due to a number of factors, including: (1) the closure of small, ineffective landfills as new regulations take effect; (2) the development of larger regional sites; (3) the uncertainty of permitting efforts of new and expanded landfills; (4) litigation over land use issues of landfills and (5) the privatization of publicly owned landfills. These factors necessitate that cities and counties undertake long-term

> planning to ensure that adequate capacity is available.
>
> The discussion below of waste capacity in the Southern California region is based on projected short-, medium-, and long-term needs. Future needs are based on several continuing and changing trends: (1) increase in population (California's population is expected to more than double from its current 30 million to more than 60 million by the year 2040 [California Department of Finance, 1993]); (2) expanded waste diversion and recycling, which is reducing the amount of material being disposed of in landfills; and (3) landfill closures and development proposals that will affect future disposal capacity.

This section then takes 12 pages reviewing and analyzing a "critical" landfill capacity shortfall in Southern California, focusing on the counties of Los Angeles, San Bernardino, Riverside, Orange, Santa Barbara, Ventura, and San Diego the seven counties within the proposed landfill's service area. The detailed discussion highlights a critical need for "additional disposal capacity" in the service area. During this particularized discussion, Kaiser's obvious pecuniary goals are nowhere in sight.

In the final EIS/EIR, we discover that the need for landfill capacity had *increased* since the Draft.

The result-oriented notion that BLM has "narrowly drawn" this statement of purpose and need is utterly wrong. Of course BLM acknowledged

Kaiser's purpose-*the law requires BLM to do so!* For private, non-federal proposals, "[a]gencies ... are precluded from completely ignoring a private applicant's objectives." *Colo. Envtl. Coal. v. Dombeck,* 185 F.3d 1162, 1175 (10th Cir.1999) (involving Vail Associates expansion of its existing ski area into the White River National Forest); *see also Citizens Against Burlington, Inc. v. Busey,* 938 F.2d 190 (D.C.Cir.1991). Read with an open mind, this statement suffers from no defects whatsoever.

B.

Public Interest

Furthermore, my colleagues' opinion inexplicably excludes from the evidence it draws upon to support its errant conclusion-that the Purpose and Need Statement is wanting-an important requirement of BLM's decision-making process: the statutory requirement that it conclude "that the public interest will be well served by making that exchange." Federal Land Policy and Management Act of 1976 ("FLPMA"), Pub.L. No. 94-579, § 206(a), 90 Stat. 2743, codified at 43 U.S.C. § 1716(a) (1994). The Code of Federal Regulations is quite specific about what must go into a "public interest" determination.

BLM must consider

> the opportunity to achieve better management of Federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives, including but not limited to:

> Protection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values; enhancement of recreation opportunities and public access; consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient management and development; consolidation of split estates; expansion of communities; accommodation of land use authorizations; promotion of multiple-use values; and fulfillment of public needs. In making this determination, the authorized officer must find that ... [t]he intended use of the conveyed Federal lands will not, in the determination of the authorized officer, significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands. Such finding and the supporting rationale shall be made part of the administrative record.

43 C.F.R. § 2200.0-6(b) (1988).

The record shows that BLM made such a careful determination, as reflected in the IBLA's opinion rejecting the NPCA's and the Charpieds' allegations to the contrary:

> As noted above, contrary to NPCA's assertions (Reply Brief at 3), BLM's decision documents and supporting Draft and Final EIS/EIR contain extensive discussions of the [public interest] factors set out in 43 C.F.R. § 2200.0-6(b). *That record shows that the*

acquired private lands have substantial value as habitat for threatened and endangered species, so that acquiring them serves the purpose of protection of fish and wildlife habitats. The position of those lands relative to current Federally-owned habitat means that their acquisition will allow for more logical and efficient management and development. We also recognize that, apart from the direct benefits of acquiring the parcels of offered private lands, approval of the exchange promotes the Project, which undeniably meets the "needs of State and local residents and their economies" by allowing both a 100-year waste disposal facility for a major metropolitan area, as well as economic development of the Project area. BLM may properly consider these factors as part of its obligation to promote multiple-use values, to fulfill public needs, and to expand communities.

Under section 206(a) of FLPMA, the Department must also find "that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired." There is no doubt that the Federal lands and interests to be conveyed here (the selected public lands) have been greatly reduced in value due to their proximity to Kaiser's mine and its spoil piles, tailing ponds, etc. (Appraisal Report Vol. I at 9-13.)

> Further, these lands are encumbered by mining claims held by KEM, such that they may be mined or even patented. *Id.* at 15. Against this background, it is evident that *disposal of these lands in exchange for wildlife habitat plainly entails a net gain for the public.*

(emphasis added).

My colleagues' opinion also ignores another section of the DEIS's articulation of the Project's purpose and need involving the benefits to Riverside County, where it will be located:

> 1.3.2.1 *County of Riverside*
>
> The proposed County action is based on the County's authority for reviewing land use applications (i.e., Specific Plans for the proposed landfill and the Townsite) for the proposed landfill and the Townsite. In making a decision on the pending land use applications, the County will consider the following County objectives.
>
> • Provide the County and jurisdictions within the County with environmentally sound, long-term disposal capacity for waste generated within the County.
>
> • Provide the County with income from the disposal fees for out-of-county waste disposed of at the site. Provide for the acquisition and preservation of valuable open space lands in

environmentally sensitive areas, for the preservation and enhancement of biological, scenic, and cultural resources in the County, and research and education concerning conservation of natural resources. This activity will be funded through the contribution of one dollar per ton of waste deposited at the landfill into a mitigation monitoring trust fund administered by the County.

• Reclaim lands disturbed by previous mining activities.

• Assist jurisdictions within the County that use the site for solid waste disposal to meet the long-term landfill capacity as set forth by state law (AB 939).

• Provide a remote, regional municipal solid waste landfill that allows transportation of waste primarily by rail and uses existing transportation infrastructure.

• Provide long-term disposal capacity to allow the County to continue closing existing unlined landfills within the County.

In evaluating this project in terms of the its purpose and the public interest, BLM added this worthy consideration:

Based on economic reports prepared by experts, the Project is projected to generate $210 to $280 million in revenue to the county

> in the first twenty years of operation. That additional revenue can be used to provide needed federal services to the residents of Riverside County. The Project will also support or save, on an annual basis, an average of 1,354 jobs in the county during the first 20 years. The overall economic impact during the next twenty years to the county is projected to be in excess of $3 billion.
>
> Also,
>
> The Project will be the only landfill in Riverside County which meets current groundwater protection and other current state and federal environmental protection requirements, thus providing sufficient waste disposal capacity to *enable the county to close existing landfills that do not meet current state and federal regulations.*

(emphasis added).

This is what BLM's district manager had to say about the value of this project to the United States in his feasibility report dated February 8, 1993:

Public Benefits and Relationship to Land Use Planning

> The public lands are identified for disposal and the private lands are recommended for acquisition under the California Desert Conservation Area (CDCA) Plan, as amended. The offered private lands are within and

adjacent to the Chuckwalla Bench and Dos Palmas/Salt Creek Areas of Critical Environmental Concern and Orocopia Mountains Wilderness Study Area designated in the CDCA Plan. Respectively, these areas contain important habitat for the desert tortoise, a Federally listed threatened species, and riparian habitat supporting[ ] the desert pupfish, a Federally listed endangered species. The land exchange would secure important habitat for these species.

He augmented his favorable opinion in 1997 in his Notice of Decision asking for public comment:

The non-Federal lands to be acquired by the United States are located within and adjacent to the Chuckwalla Bench and Dos Palmas/Salt Creek Areas of Critical Environmental concern. Respectively, these areas contain important habitat for the Desert Tortoise, a federally listed threatened species, and habitat supporting two federally listed endangered species, the Yuma Clapper Rail and Desert Pupfish.

The Federal lands being conveyed consist of highly disturbed lands in and around the Eagle Mountain Iron Ore Mine located north of Desert Center, California. The Federal lands will be used to facilitate the proposed development of the Eagle Mountain Landfill and Recycling Center Project, a Class III non-hazardous municipal solid waste landfill in Riverside County. Disposal of the Federal

> lands is consistent with the California Desert Conservation Area Plan of 1980, as amended. The public interest will be well served by making the exchange.

In summary, my colleagues' opinion suffers from a fundamental flaw in its quarantined analysis of two interrelated issues, the purpose and need for the project, on one hand, and whether the exchange of federal land serves the public interest on the other. They grudgingly conclude that the BLM adequately determined that the public interest is served by the landfill, but, in the same breath, they claim to have found a defect in BLM's articulation of the project's purpose and need. How can a project that satisfies the rigorous public interest demands of the exchange law fail because its purpose and need over represents primarily private goals and objectives? It is a mistake to approach these two statutory requirements as separate and independent from each other, especially in a case such as this where the exchange is between a private entity and a public interest. Of course Kaiser has its own goals it hopes to accomplish from this project, and of course it hopes to make a profit, but it seems blindingly apparent that its goals dovetail with the public's need for a landfill, and especially a landfill such as this that not only meets and far exceeds our laudable environmental expectations, but greatly *enhances, by the acquisition of 2,846 acres, contiguous federal land that protects endangered species living on it.*

The Record of Decision says this about value to BLM:

> **4.2 Acquisition of Important Wildlife**

Habitat: The proposed land exchange presents an opportunity for BLM to achieve better management of Federal lands by allowing BLM to consolidate Federal ownership of land that contains habitat for listed species. In the land exchange, BLM would acquire approximately 2,846 acres of Kaiser lands, which contain important habitat for the desert tortoise, a Federally listed threatened species, and for the desert pupfish, a Federally listed endangered species, and for other environmentally sensitive species. In addition to the lands acquired as part of the land exchange, BLM also would acquire approximately 400 acres of desert tortoise habitat for mitigation of impacts caused by the Project. This land would be purchased by the applicant, and then would be conveyed in fee to BLM as mitigation for the loss of 160 acres of tortoise habitat, which would be used for widening and extending the Eagle Mountain Road as part of the Proposed Action. Given the lands to be acquired, including the mitigation land, the land exchange would further BLM's objective of securing additional protection of important habitat for sensitive species.

The Kaiser lands to be acquired by BLM in the land exchange are located in four geographic areas (see Exhibit "B"). The location of these lands, and the environmental benefits associated with their acquisition, are summarized a follows:

Group A: Salt Creek (Dos Palmas) ACEC

T. 8 S., R. 11 E.

Section 13: NE1/4

Section 21: E1/2E1/2SE1/4

Section 23: Described in metes and bounds.

These three parcels are located in the vicinity of the Salt Creek (Dos Palmas) Area of Critical Environmental Concern (ACEC). The entire ACEC area of about 14,000 acres includes both Federal and private lands and is popularly referred to as Salt Creek (Dos Palmas) ACEC, even though the ACEC only includes the Federal lands. One of the management objectives in the Salt Creek (Dos Palmas) area is to acquire private lands for the management of various palm oases and seeps that provide habitat for the desert pupfish and Yuma clapper rail, both Federally listed endangered species. Over 3,200 acres have been acquired or are in the process of being acquired by BLM. All three of Kaiser's parcels will contribute to consolidating Federal lands, thus enhancing management of the area. The parcel in Section 23 contains desert pupfish habitat along a tributary to Salt Creek.

Group B: Orocopia Mountains Wilderness

T. 7 S., R. 12 E.

Section 35: Described by metes and bounds

Section 36: N1/2SW1/4, SE1/4NW1/4, S1/2NE1/4

T. 7 S., R. 13 E.

Section 31: Described by metes and bounds

These three parcels are located on the southern boundary of the Orocopia Mountains Wilderness Area. They are not contiguous to the Wilderness Area. However, consolidation of Federal lands in this area would simplify land management and enhance recreational opportunities. These parcels are in an area designated by the USFWS as critical habitat for the desert tortoise under the Endangered Species Act. A population of approximately 50 Nelson's bighorn sheep occurs in this area and another population of approximately 100-200 sheep occurs in the Chocolate Mountains to the south. These populations migrate between the mountain ranges in the vicinity of the parcels. Nelson's bighorn sheep is a State of California fully protected species and a BLM sensitive species. Populations of Orocopia Sage, a Federal species of concern, occur on all three parcels. Acquisition of Kaiser's parcels would block up a large area of BLM managed lands and enhance management of lands used by migrating bighorn sheep.

In summary, my colleagues' opinion's claim that BLM "foreordained" the approval of this exchange is indefensible in terms of the record.

C.

Consideration of Alternatives

These egregious errors are then improperly used to force the declamatory conclusion that BLM's consideration of a "range of alternatives" was "similarly unreasonable" and defective. This is easily demonstrated to be wrong simply by reading the record, which contains a pithy section discussing a range of alternatives. Identified and discussed at length are the following:

Alternatives Considered in Detail

1. No action

-Status quo

2. Reduced volume of onsite disposal

3. Alternate road access

-No new road construction

4. Rail access only

-Elimination of hauling trucks

5. Landfill on Kaiser land only

-No land exchange/small landfill footprint

6. Landfill development/no Townsite development

-No resuscitation of the existing Townsite

Alternatives Considered But Eliminated

1. Landfill on other Kaiser property

2. Waste Diversion

3. Proposed offsite/and fill diversions

4. Landfill mining

5. Alternative Townsite locations

6. Alternative Townsite land use and density

Accordingly, BLM determined that the preferred alternative is the Proposed Landfill Action. Riverside County, required to conduct a different analysis, agreed with this assessment:

> Pursuant to CEQA, the County has determined that the environmentally superior alternative is the No Action Alternative. The No Action Alternative would leave the Project site in its present condition and avoid the potential impacts of the proposed landfill. The No Action Alternative could, however, lead to its own adverse impacts, such as the adverse visual impact of

the disturbed mining site and the remaining tailing piles. Also, the potential impacts associated with continued reliance on new or existing landfills in Southern California could be substantial, such as air quality impacts or groundwater impacts at existing unlined landfills. In addition, the other objectives of the Project as listed in Sections 1.3.2.1 and 1.3.2.2 would not be realized if the No Action Alternative were chosen. However, with respect to impacts in the vicinity of the Project site, the No Action Alternative is, on balance, the environmentally superior alternative.

Where the No Project Alternative is determined to be the environmentally superior alternative, CEQA requires that an environmentally superior alternative be selected from the remaining alternatives. There are no clearly environmentally superior alternatives compared to the No Action Alternative. However, as required by Section 15126(d)(4) of the CEQA Guidelines, the County has determined that, on balance the Proposed Action Alternative is the environmentally superior alternative among the remaining alternatives. Many of the potential impacts of the proposed Project are the same or similar to the potential impacts of the remaining alternatives. Some alternatives would, however, have a greater level of impacts than the proposed Project. For example, the Landfill on Kaiser Land Only Alternative without the land exchange

would diminish the protection of habitat and wildlife because there would be no consolidation of sensitive habitat lands resulting from the land exchange.

That alternative and the Reduced Volume Alternative would also decrease the level of contribution to the Environmental Mitigation Trust Fund, thus diminishing the funding available for acquisition of habitat lands. The Reduced Volume Alternative and the Rail Access Only Alternative could also extend the duration of certain impacts by extending the life of the landfill. These other alternatives, however, could reduce the level of a few impacts in comparison to the proposed Project. Only the No Action Alternative would result in impacts considered not to be significant.

In summary, BLM approved this exchange because the project not only provides a benefit to Southern California and to Riverside County, but also because it serves important federal law management objectives.

III

EUTROPHICATION

What is it? Essentially, eutrophication is a term that refers to an increase in chemical nutrients in an ecosystem, either on land or in water. The word itself is derived from Greek, "eu," meaning "good," and "trophic," meaning "food" or nutrients. Nitrogen,

which is at the root of the controversy in this case, is an essential element in the lives of both animals and plants and, in fact, occurs naturally in great quantity in the atmosphere. Nitrogen is also a key element of the fertilizer used positively to increase the food productivity of land throughout the world.

The environmental "problem," of course, occurs with anthropogenic eutrophication which causes alterations in plant or animal life-or both-in a manner regarded as not positive. I note that most of our national eutrophication concerns involve negative changes in bodies of water caused by the anthropogenic introduction of excessive amounts of phosphorus. I have yet to find a situation where the introduction of nitrates into a desert ecosystem has caused material environmental harm. The Charpieds fear that this is such a case, a concern refuted by the facts.

The parties cannot agree on the scope of alleged eutrophication concerns in this case as it relates to the consequences of nitrate deposition. As summarized by the district court,

> Plaintiffs contend that BLM neglected to address significant impacts on the environment due to eutrophication including an increased presence of scavenger raven and coyote populations, impacts on bird, mice, and other small animal feeding habits due to the nutrients from the landfill and windblown trash, and irreparable impacts on the desert food chain.

Relying on the closed and covered nature of the landfill, Kaiser asserts that the only source of nitrates related to the landfill are an insignificant consequence of "atmospheric nitrate deposition from the emission and transport of anthropogenically generated nitrogen compounds."

In the main, the plaintiffs complain that the defendants did not take a "**hard look**" at this problem, as they were required to do by NEPA. I disagree.

In their Statement of Reasons supporting their appeal to the IBLA, the Charpieds describe their eutrophication problems as follows:

> A major concern to commenters, particularly NPS, was the impact of the dump adding a large volume of nutrients into an environment which has been nutrient scarce for millions of years (see FEIS/R under Agencies page 69). Despite repeated request [sic] from NPS to address the eutrophication process, BLM and Kaiser/MRC refused to conduct such an analysis.
>
> The EIS/R admitted "an increase in road kills of local wildlife species would likely result from the project's 12 to 16 hour per day truck traffic along access roads" (see DEIS/R 4.7-6)[.] It is also acknowledged that common raven and other scavenger populations "could increase in response to increased food in the form of road-killed animals[.]" *Id.* Yet, the EIS/R never grappled with the important

concept of eutrophication from this increase, or other possible causes of eutrophication, such as adding 20,000 tons of food (garbage) to a nutrient scarce area. The EIS/R noted the Council on Environmental Quality's ("CEQ") description of biodiversity: "the concept that all components of ecological systems, both living and nonliving, are interconnected in a hierarchical continuum, and that changes in the diversity at any level in that hierarchy can have effects at other levels ..." (see DEIS/R 3[.]7-28). The EIS/R also acknowledged that growing scientific evidence supported a deep concern for biodiversity caused by human activity that adversely affects the components of ecosystems and their interconnections; this results not only in species extinction, but in disruptions of the functions of ecosystems on which all life depends; and the introduction of exotic species can eliminate native species through predation, competition, or disease transmission, and alter interconnections between species, changing ecosystem functions (see DEIS/R 3.7-30). Further the EIS/R recognized that "because water and primary productivity are limited, desert ecosystems recover very slowly from disturbances that disrupt the interconnections between living and nonliving components of the system" (see DEIS/R 3.7-31). Despite these important factors, the EIS/R failed to analyze eutrophication and its impact to JTNP's ecosystem[.]

> The Agreement between NPS and Kaiser/MRC does not remedy the inadequacy of the EIS/R's assessments of impacts and mitigation measures. (See FEIS/R Appendix T for Agreement[.]) BLM mischaracterizes a side agreement ("Agreement") entered into between the polluters and NPS, and then cite [sic] said Agreement 30 times in response to NPS' concerns in defense of the adequacy of the EIS/R's analysis[.]

This concern about an increase in raven and "other scavenger populations" (unnamed) due to "roadkill" strikes me *from the record* as greatly exaggerated, and it suggests simply going down the list of usual environmental concerns and then manufacturing a groundless make-weight argument to try to inject eutrophication into this case.

Contrary to (1) the Charpieds' overblown concerns and claims, (2) the district court's mistaken view of this record, and (3) my colleagues' opinion, the BLM *did* examine eutrophication and determined-correctly so from the record-that it was *not* a serious issue. Here is what the IBLA had to say about the issue as raised by the Charpieds:

> "Eutrophication" is a process, associated with aging aquatic ecosystems such as lakes, whereby concentrations of phosphorus, nitrogen, and other plant nutrients increase, altering the ecosystem by algae blooms or microscopic organisms. "Cultural eutrophication" occurs when the aging

process is sped up by the activities of humankind by allowing excess nutrients in such forms as sewage, detergents, and fertilizers to enter the ecosystem. *Encyclopedia Brittanica,* Micropaedia Vol. III at 1007 (1979).

In the present context, NPS used the term "eutrophication" to refer to the addition of nutrients (in garbage and trash) to the desert ecosystem, raising the possibility that the ecosystem would be upset by the proliferation of animal life such as insects and rats. NPS requested that this possibility be examined in the EIS/EIR process. *NPCA II* at 29-30.

The Charpieds assert that BLM failed to adequately assess "impact of the dump adding a large volume of nutrients into an environment which has been nutrient scare for thousands of years." (Charpieds' SOR at 39-30.)

n.16

We must ... review each issue [including eutrophication] to determine whether the effects cited by the Charpieds are "relevant matters of environmental concern" or constitute "probable environmental consequences," such that BLM was required to present a "reasonably thorough discussion" of them as part of its requisite "**hard look**." The record shows that the EIS/EIR satisfies BLM's obligation to take a "**hard look**" at

such impacts.

. . . .

The EIS/EIR addressed "eutrophication" and roadkill. (Draft EIS/EIR at Sec. 4.7.4, ROD at 15; Final EIS/EIR at 7-22 to 7-24; Response to Comments 1-123 and 1-153.) The Charpieds fail to specify how this assessment is deficient and thus fail to meet their burden of showing error in BLM's review. Effects of night lighting were addressed. (Final EIS/EIR Sec. 6.6.)

To the extent that appellants fault BLM for not considering the possibility that mining of the site will resume at some point in the future, compounding environmental questions, this issue goes beyond presently foreseeable effects. BLM's approval of the Project is subject to ongoing monitoring to determine whether additional adverse impacts to the ecosystem eventuate.

NEPA is primarily a procedural statute designed "to insure a fully informed and well-considered decision." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). That is, although NEPA requires an agency to prepare an EIS where significant impacts are identified (as BLM did here), nothing in NEPA restrains an agency from proceeding with an action that will have significant

> impacts where it decides that other values outweigh the environmental costs. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350-51, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989); *Paul Herman,* 146 IBLA 80, 102 (1998). The purpose of preparing the EIS is to inform the agency of possible adverse environmental effects in hopes that the agency can mitigate them. This expectation was well rewarded in this case. As discussed herein, BLM did not disregard the adverse effects identified in its EIS/EIR, but proceeded to carefully consider them (as well as six other alternatives (ROD at 3)) and develop mitigating measures to reduce or eliminate them, in consultation with Departmental agencies responsible for the subjects presented. We find no basis to disturb its decision.

My colleagues register concern that eutrophication discussions are found only in scattered sections of the EIS and that one has to "cull through entirely unrelated sections of the EIS and then put the pieces together" to find them. They call this a "patchwork," and they find such to be a fatal flaw. All I can say is that (1) it was the Charpieds' burden to identify the failures they alleged, (2) the California Court of Appeal thoroughly examined and analyzed the eutrophication allegations in 1999 and had no trouble finding its way through the record, (3) I had no trouble finding eutrophication in this voluminous record, and (4) neither did the IBLA.

I note here that the DEIS contains an enormous,

detailed, and well-organized Table of Contents (with appendices) spanning 17 pages. Only someone intent on not finding what they hoped was not there could fail to locate matters of their concern in this admittedly gigantic document. But, the clear road map is there.

To save space, let's go to the Response to Comments section of the EIS:

> A commenter has stated that ecosystem impacts, such as eutrophication, are defined in the "broad sense, referring to the large-scale addition of nutrients (i.e., landfill trash) to the desert ecosystem" (Appendix 2 of Comment 1) and has requested that the EIS/EIR explain the impact of the proposed Project on the regional ecosystem, including impacts on "subtle and interconnected plants, animals, and processes, most of which presently are unknown." (NPS, Joshua Tree National Park Issues Identification for the Eagle Mountain Landfill Environmental Impact Statement/Environmental Impact Report, 1995). The JTNP Issues Identification paper also identified possible ecosystem impacts attributable to the Project (i.e., wet dry deposition of nitrate, global warming, and invasion of exotic species) and requested additional studies and experiments to assess ecosystem impacts. Upon review of the requested studies and experiments suggested by the NPS, the lead agencies determined that existing data were available and sufficient for assessing impacts to

biodiversity and ecosystem function. The Draft EIS/ EIR addresses all these possible impacts associated with the Project, including habitat loss, additional nutrients originating directly or indirectly from landfill material (defined as "eutrophication" by NPS), the introduction of exotic species, nitrate deposition, and global warming.

For example, the Draft EIS/EIR (Section 4.7.4) states that the proposed Project could affect biodiversity "primarily as a result of loss of habitat, habitat fragmentation, and changes in the relationship between species in the form of increases in predator/scavenger populations in response to increased food availability at the landfill site, and from increased roadkills." The EIS/EIR presents a full analysis and discussion of these impacts and appropriate mitigation, where applicable.

Control measures proposed to be implemented are described above in General Response 3, and include continuous covering of waste, limiting the work face to 2 acres or less, litter fencing, litter patrols, and providing additional cover for any area that has not been active for 180 days.

To control conditions at the Townsite that could also lead to an increase in predators, measures identified for predator control will also be employed at the Townsite. These measures will include educating Townsite residents of the factors that increase raven

and other predator populations, and restrictions requiring disposal of trash and garbage only in tightly closing trash receptacles. Areas around businesses will be patrolled regularly to collect trash. Feeding domestic animals outside in areas accessible to ravens will be prohibited. Buildings and other structures that could provide nest sites for ravens will be monitored regularly. Other restrictions on Townsite activities are described in Section 4.7 of the Draft EIS/EIR.

The mitigation measures proposed for the Project address potential impacts to a broad range of plants and animals that occur in the Project area. Mitigation measures have been identified, in consultation with the appropriate regulatory agencies, for potential impacts to all special status species, and will be implemented as a condition of Project approval. At the request of the [California Department of Fish and Game] and other resource agencies, additional mitigation measures will be implemented for species that have no protected status and/or are not anticipated to experience significant impacts. For example, the California Barrel Cactus is not a protected species, but is considered an important food and water source for Nelson's Bighorn Sheep, especially in time of drought. Mitigation for this species includes transplanting and monitoring to ensure the success of transplanting. Similarly, mitigation measures will be implemented for the Common chuckwalla, which has no

formal protected status. These will include surveying and removing individual animals from Project areas. The aggregate of the mitigation measures proposed for protected and other species will help assure that the biodiversity of the Eagle Mountain Project area is protected and maintained. The availability of the Environmental Mitigation Fund as a tool to acquire and protect prime habitats in the Southeastern California desert will further contribute to the protection of biodiversity and ecosystem function.

Environmental Mitigation Trust

A number of commenters requested additional detail about how the Draft Environmental Mitigation Trust (Appendix U of the Final EIS/EIR) would function and how it would contribute to the mitigation of Project impacts. The overall goals and functions of the Environmental Mitigation Trust, as currently proposed, are described on pages 4.7-14 of the Draft EIS/EIR. The Draft Trust includes elements of the negotiated Agreement with Kaiser/MRC and NPS and certain discussions with CDFG. Specifically, the Draft Trust specifies that 72 percent of the fees would be used to acquire lands that provide high-quality habitat for special status species in the region. In addition, 18 percent of the funds would be used for long-term monitoring, research, and mitigation. The remaining 10 percent of the funds would be used to acquire private parcels in JTNP and for long-term research and mitigation associated with potential

Project impacts to JTNP. Lands to be acquired would be identified by an advisory committee appointed by the Trustees of the Trust (the County of Riverside Board of Supervisors).

The Draft Trust agreement specifies that the nine members of the advisory committee shall all be residents of Riverside County and comprise two members of the Board of Supervisors of the County of Riverside; two citizens appointed by the Board of Supervisors, one of whom must be a Native American; two citizens nominated by the Coachella Valley Mountains Conservancy; one citizen nominated by The Nature Conservancy; and one citizen nominated by The Desert Protective Council. Because land acquisition expenditures would be recommended by this advisory committee, specific acquisition locations cannot be identified at this time. The Draft Trust Agreement, however, specifies that lands acquisition expenditures would be restricted to or for the benefit of lands within 15 areas in desert environments of Southern California identified in the Trust Agreement (with provisions for expenditures in other project areas if acquisition in the 15 identified areas have been reasonably met and with the consent of 4 of the 5 trustees). The 15 areas listed as priority areas for acquisition were identified in a January 1994 California Endangered Species Act Memorandum of Understanding between MRC and the CDFG.

Section 4.7.4 of the Draft EIS, "Biodiversity and Ecosystem Function," says:

The NPS has expressed concern that

operation of the landfill will result in eutrophication (increased primary productivity) at JTNP as a consequence of atmospheric nitrate deposition. Atmospheric nitrate deposition results from the emission and transport of anthropogenically generated nitrogen compounds. Sources include agricultural emission of ammonia/ ammonium and organic nitrogen from animal wastes and fertilizer applications, and oxides of nitrogen emitted from fossil fuel combustions (automobiles, power plants, industry) (Paerl, 1993). Recent studies indicate up to 30 kg/ha/yr of dry nitrate are deposited primarily from automobiles in the San Dimas Experimental Forest, just east of Los Angeles (Personal Communication, Kathy Freas/CH2M Hill with E. Allen. August 17, 1995).

Increasing nitrate deposition is of concern in desert ecosystems because desert soils typically are nutrient poor and primary production can be limited by nitrogen availability. Increased nitrogen could potentially allow the establishment and spread of plant species that otherwise would not occur in the desert because of nitrogen limitations. Sources of nitrate associated with the proposed Project are limited to fossil fuels used by trucks and trains delivering waste to the landfill and to the use of personal vehicles and home heating for occupants of the Townsite. Landfill gases include only methane and carbon dioxide and are not a

source for oxides of nitrogen. The small amounts of nitrate produced as a result of fossil fuel use associated with landfill operation would be eclipsed by the amount of nitrate produced in the Los Angeles Basin and in urban desert communities closer to the landfill. Additionally, nitrate is transported by prevailing winds, which are westerly in the vicinity of the proposed Project. Because the landfill is southeast of JTNP, nitrates generated from landfill operations would be transported away from JTNP rather than toward it. JTNP expects to see an increase in visitorship to the park to 4 million persons per year by the year 2010 (NPS, 1995). Many, if not most, of these visitors will arrive by automobile and will drive through the park. This source of nitrates from fossil fuel combustion is expected to be greater than that produced by landfill operations. Nitrate deposition associated with landfill operations, therefore, is expected to have no effect on ecosystem function [in] JTNP (see Section 4.4 Air Quality).

Then, there is the Agreement with the NPS covering ravens and other predators, which addresses any unanticipated predator and raven problems about which the Charpieds worry:

3.6 DESERT TORTOISE-Kaiser/MRC shall undertake the following obligations in connection with the Desert Tortoise:

3.6.1. Conduct and continue the existing

raven monitoring program from at least twelve (12) months prior to commencement of operation for a period of at least 10 years.

3.6.2. Conduct, beginning at least twelve (12) months prior to commencement of operation of the Project and continuing for a period of at least 10 years, a predator monitoring program at the Project.

3.6.3. Mitigate potential increases in raven, coyote, kit fox, and other predator populations caused by the presence of trash at the Project. If the Common Raven population in the region of the Project increases as a result of landfill activities, then an active control program will be instituted. Kaiser/MRC will present its control plan and depredation permits to NPS prior to start up of the landfill. If control measures are instituted, but found to be ineffective, Kaiser/MRC will revise its control plan and implement a new plan.

3.6.4. Fence the perimeters of all active landfilling and waste handling areas with fencing designed to exclude large scavengers and place a minimum of 6 inches of appropriate cover material over deposited and compacted refuse on a daily basis to minimize raven, rodent, and other opportunistic scavenging.

3.6.5. Conduct, upon commencement of landfill operations, a non-lethal predator

control program, that will, as a minimum include hazing at the landfill site, coyote and kit fox aversion (aversive conditioning) techniques, prompt *removal of road-killed wildlife* along access roads, and the possible use of bird repellent methyl anthranilate.

The California Court of Appeal had this to say in 1999 about eutrophication:

Eutrophication (Nutrient Addition)

In its ruling, the [Superior] court found insufficient evidence to support the EIR's conclusion that impacts to the Park will be less than significant regarding "the impact of the landfill on the biological resources of the [P]ark as a complex and interrelated system, which the [NPS] describes as eutrophication." In 1995, the Park staff requested that as part of the EIR process, the involved agencies study the phenomenon of adding nutrients (trash) to the dry, harsh desert landscape, possibly causing insects and rats to proliferate, then starting the food chain going full tilt and upsetting the Park ecosystem. (This phenomenon is termed eutrophication after the similar effects of adding nutrients to lakes and upsetting their ecosystems.) The Park recommended such studies as computer modeling and animal tracking (trapping rats and insects at existing landfills, and inventorying animal feces to analyze whether human-generated trash was being transported) for several years to project the

impact of the landfill, if it were to be built.

The EIR approached this problem in several ways, directed toward containment of the refuse: (1) The EIR proposed such measures as keeping incoming refuse in sealed containers until transported to a limited working area, creating litter fences, conducting a storm watch to avoid the scattering of materials by windstorms, and covering the waste with dirt and mining debris to avoid access by ravens. Similar measures have proved effective at other landfills. (2) The landfill will have a state-of-the-art liner and operations design as part of the system for confining the waste. (3) Studies were made of the Los Angeles experience with landfills, in which rats were fitted with radio transmitters and researchers found that daily landfill operations (bulldozing and compacting waste) kill rats. Other studies have shown that insects do not proliferate at landfills if daily cover is properly applied. (4) All ponds and water sources will be covered and the areas fenced to prevent access by predators such as ravens, coyotes, or kit foxes. (5) The proponents entered into the mitigation agreement with the NPS to provide for additional mitigation measures if necessary. (6) The EIR includes responses to comments, including the Park issues identification paper, stating that the lead agencies determined that existing data were available and sufficient to address impacts to

> biodiversity and ecosystem function. The EIR addresses such possible impacts from the project as "habitat loss, additional nutrients originating directly or indirectly from landfill material (defined as 'eutrophication' by NPS), the introduction of exotic species, nitrate deposition, and global warming." The comments give the example that biodiversity could be affected by " 'changes in the relationship between species in the form of increases in predator/scavenger populations in response to increased food availability at the landfill site, and from increased road kills.' "These impacts and appropriate mitigation were discussed in the EIR.

Nat'l Parks & Conservation Ass'n v. County of Riverside, 71 Cal.App.4th 1341, 84 Cal.Rptr.2d 563, 576 (1999). "It is speculative whether the eutrophication effect will occur, but if it does the NPS agreement provides for environmental mitigation measures to deal with the problems." *Id.* at 577.

In conclusion, my colleagues claim that "[t]his patchwork cannot serve as a 'reasonably thorough' discussion of the eutrophication issue" demonstrably and grossly mischaracterizes the record, and is flatly wrong. It inappropriately gives the back of this Court's hand to a massive and thorough process and resulting responsible environmental decisions and documents.

IV

HIGHEST AND BEST USE

The appellees now claim pursuant to the FLPMA that BLM's appraisal of the value of the federal land to be transferred to Kaiser for the landfill failed to consider the "highest and best use" of that property as part of the intended commercial landfill. Their untimely assertion is that BLM's selection of potential land uses for its highest and best use determination did not include the use as a landfill as one of its markers. *See* 43 C.F.R. § 2201.3-2(a)(1), (2). They argue that Kaiser is not paying enough for the federal lands it seeks to acquire.

A.

Failure to Exhaust

The first problem with this newly-minted claim is that the plaintiffs did not present it to the IBLA, as they were required to do pursuant to the jurisdictional doctrine of exhaustion. *Great Basin Mine Watch v. Hankins,* 456 F.3d 955, 965 (9th Cir.2006) ("The APA requires that plaintiffs exhaust administrative remedies before bringing suit in federal court. 5 U.S.C. § 704. This requirement applies to claims under NEPA."). I draw this conclusion from the Statements of Reasons for their appeal to the IBLA-one from the NPCA and one from the Charpieds.

First, the NPCA's Statement of Reasons for the appeal:

> II. **THE BLM WILL NOT RECEIVE FAIR MARKET VALUE FOR THE EXCHANGE.**

> Any disposal of federal land must be compensated at "fair market value of the use of public lands and their resources." 43 U.S.C.A. § 1701(a). Here, the compensation being offered in exchange for the public lands in question is inadequate, and egregiously low. As a part of the land exchange, BLM will hand over 3,481 acres of federal land just outside Joshua Tree, providing the bulk of lands needed by Kaiser for the proposed Landfill. In return, Kaiser will transfer 2,486 acres of private land to BLM. To compensate for the approximately 1,000-acre differential, Kaiser will also pay BLM a lump sum of $20,100, which is well below the fair market value. Kaiser anticipates huge profits from a landfill operation on the undervalued BLM land, well beyond the $20,000 amount that would be paid for approximately one third of the property. Here again, Kaiser and a few other parties will benefit at a significant cost borne by the national treasury.

As for specific defects in the method of evaluation, this is what NPCA said:

> Here, BLM's own analysis reveals its failure to incorporate wildlife and aesthetic value into the valuation of the federal lands. *An appraiser, in determining market value, "shall include historic, wildlife, recreation, wilderness, scenic, cultural, or other resource values."* 43 C.F.R. 2201.3-2(a)(3). Certainly, BLM land in close proximity to Joshua Tree

> (1.5 miles away) carries significant wildlife, wilderness, scenic, and cultural value to the one million yearly visitors to Joshua Tree. The land exchange appraisal prepared for BLM does not accurately reflect this value.

Nowhere does this statement with sufficient clarity identify as a flaw BLM's alleged failure to value its lands as part of a proposed landfill, nowhere does it use the term "highest and best use." The reason given is generic and not specific or particularized.

"[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agencies' attention," seeking to attack it in court. *Vt. Yankee Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553-54, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). The purpose of the exhaustion requirement is two-fold. The requirement is designed (1) to "avoid [ ] premature claims," and (2) to "ensur[e] that the agency be given a chance to bring its expertise to bear to resolve a claim." *Great Basin Mine Watch*, 456 F.3d at 965 (quotation omitted). The NPCA's statement, vaguely alleging without explaining why the land was undervalued, serves neither of the twin objectives of exhaustion. The proof of this pudding is in the eating. Nowhere in the IBLA's decision is the valuation as a landfill "issue" addressed, and not because they overlooked it, but because the plaintiffs did not raise it. Everything the plaintiffs did raise *was* addressed.

The Charpieds' Statement of Reasons for the appeal is no better; in fact, it is worse. In what amounts to a 36-page jeremiad laced with invective and unsupported allegations of corruption, payoffs, and kickbacks against numerous individuals and all the agencies involved-including the Nature Conservancy-they attack everything in sight-*except* the BLM's choice of its appraiser's *method* of valuation. Again, no mention of a valuation-as-a-landfill deficiency, no use of the words "highest and best use," and no reference to the relevant valuation rules. Instead, we find statements like this: "We charge the California BLM with the under-value of the select public lands in their continual serving of preferential treatment to the developers, while ripping off the taxpayers." "The taxpayer is being swindled." "BLM lied...." "The U.S. Attorney advances 'lame contentions'...." "The BLM shamelessly extorts from the Constitution and the people [powers it doesn't have]." "Gee, some guys [like Kaiser] get all the breaks." "In short, the smooth talking polluters played Washington D.C. officials like a fiddle." "Payola." "If we haven't made ourselves clear, perhaps this is a good time to remind the [Administrative Law Judge] that this proposal stinks of back room deals, hidden agendas and intrigue, lacks any semblance of integrity or ethics in government, and is worthy of an Inspector General's investigation."

The only thing that is clear about this Statement of Reasons is that the Charpieds are against this proposal. They are not interested in a "**hard look**," only in stopping the project, period. Interspersed

between all the unproductive name calling, they raise every objection one might imagine-*except* the issue of "highest and best use" upon which they now attempt to prevail. Shades of *Vermont Yankee.*

Looking at the IBLA's opinion, one sees that the IBLA directly addressed *all* the objections the Charpieds and NPCA did raise. This fact underscores the wisdom of the exhaustion rule. If you raise it, the IBLA will examine and answer it. Again, I turn to the record:

> Section 206(b) of the FLPMA requires that the values of the public and private lands exchanged be equal or equalized by the payment (absent waiver in appropriate circumstances) of not more than 25 percent of the total value of the land transferred out of Federal ownership. 43 U.S.C. § 1716(b) (1994); 43 C.F.R. §§ 2201.3(a) and 2201.5(c)(2); *see Brent Hansen,* 128 IBLA 17, 19 (1993); *Havasu Heights Ranch & Development Corp.,* 102 IBLA 1, 7-8 (1988).
>
> The Charpieds assert that BLM undervalued the selected public lands taken by KEM in the exchange (Charpieds' SOR at 1-2), suggesting that it did not meet the requirements of 43 C.F.R. §§ 2201.3(a) and 2201.5(c)(2). NPCA also argues that BLM will not receive fair market value for the exchange. (NPCA SOR at 5-6). It is well established that a party challenging an appraisal determining fair market value is generally required to either show error in the

methodology used in determining fair market value or, alternatively, submit its own appraisal establishing fair market value. *See Voice Ministries of Farmington, Inc.*, 124 IBLA 358, 361 (1992); *High Country Communications, Inc.*, 105 IBLA 14, 16 (1988). Appellants have submitted no appraisal here. Nor have they shown error in the methodology of the appraisal. We accordingly do not agree that the public is not receiving full value for the selected public lands. In these circumstances, the BLM appraisal is properly upheld. *See, e.g., Brent Hansen,* 128 IBLA at 19; *City of Santa Fe (On Judicial Remand),* 120 IBLA at 315; *Burton A. McGregor,* 119 IBLA at 105.

We specifically reject the Charpieds' argument (SOR at 1) that BLM failed to properly value the reversionary interest in the tract of land they describe as the campsite/millsite lands. BLM instructed the appraisers to appraise the reversionary interest in the surface estate of the tract in terms of the "fee simple estate, disregarding the [e]ffect of any title encumbrances," including the reversionary interest, and to appraise the tract "as if in a raw, unoccupied state, disregarding any of the existing improvements." (Appraisal Report, Vol. II, at iv, 4, 14). The record indicates that these instructions resulted from an agreement between BLM and KEM which was designed to resolve the problem of how to appraise the reversionary interest, under which KEM

agreed to pay for the full fee simple title to the campsite/ millsite lands even though it already held the principal interest in those lands. (Letter to BLM from KEM dated May 5, 1993). The surface estate was patented to KSC in 1955 and was being held subject only to KEM's continued compliance with the terms of the patent. So long as it did so, KEM could hold the surface estate indefinitely, subject to the possibility of reverter. We find no fault with this compromise, and appellants have provided no basis to disturb it. To avoid even the possibility of undervaluing its reversionary interest, BLM instructed the appraiser to value that interest as if it were a fee simple interest in the surface estate of the land, that is, as if the reverter had occurred. This undoubtedly *increased* the value attributable to the reversionary interest, thus maximizing its value for purposes of the exchange and benefitting the United States by increasing the overall value of the selected public lands in the exchange.

We also reject the Charpieds' argument (Charpeids' SOR at 1) that, by disregarding revenue from improvements that have been built on the campsite/ millsite lands, BLM undervalued the reversionary interest. That argument disregards the critical fact that, if the lands ever had reverted to the United States, those improvements could be removed. Such improvements and associated "revenue stream" belong to KSR and its successors, not to the United States, which

has no claim to reimbursement for their value.

By the same token, the valuation of the offered private lands is not defective because it did not include the value of railroad tracks which cross the property (*see* Charpieds' SOR at 2), as those improvements will not belong to the United States following the exchange, but will remain in Kaiser's possession on the property under authority granted by the right-of-way. In these circumstances, it was appropriate to value the lands "as if in a raw, unoccupied state, disregarding any of the existing improvements," (Appraisal Report, Vol. III at 5, 23), as those improvements can be removed by the right-of-way holder.

The Charpieds assert that the appraisal misstates the present use classification of the selected public lands as "designated for Open Space and Conservation." (Charpieds' SOR at 1-2). We are unable to find such statement, and the Charpieds provide no citation. The appraisal Report expressly states to the contrary *that the selected public lands were "appraised based on [their] estimated highest and best use as if available in the open market,* in accordance with the underlying zoning regulations, County of Riverside General Plan land use recommendations, and [CDCA] Plan land use recommendations" (Appraisal Report Vol. I at 43-44), concluding, in view of the absence of "imminent development potential," that "the highest and

best use of the selected public lands is estimated to be holding for speculative investment and future capital appreciation." *Id.* at 47.

The Charpieds argue that the Notice of Exchange Proposal (NOEP) violated 43 C.F.R. § 2201.2(a)(1), because it failed to name Kenneth Statler as a party "involved in the present exchange." (Charpieds' SOR at 2). Appellants have failed to show that Statler, who apparently at one time held a leasehold interest in a portion of the campsite lands that has now expired, owns any interest in the lands involved in the exchange. Accordingly, we agree with KEM that he is not "involved in the present exchange" and need not have been identified under 43 C.F.R. § 2201.2(a)(1). Nor did the NOEP need to mention MWD (Charpieds' SOR at 20), which is not a participant in the exchange, but is instead the grantee of a right-of-way.

The Charpieds also argue that the NOEP violated 43 C.F.R. § 2201.2(a)(2) by not identifying 400 acres of desert tortoise habitat that KEM will donate to BLM. That "donation" is actually being made as mitigation for the expected loss of desert tortoise habitat caused by the widening of Eagle Mountain Road. We agree with KEM that it was not required to list those lands in the NOEP because, at the time of the preparation of that document, the extent of loss of habitat was not known and could not

have been accurately foreseen. At this time, KEM has committed itself (as a condition of the land exchange agreement) to purchase 400 acres of tortoise habitat and donate it to the United States for preservation to mitigate expected damage to 160 acres of tortoise habitat resulting from the widening of Eagle Road. We find nothing impermissible in that. The valuation of the selected public land and offered private lands are not affected. Public involvement in this process can await the execution of the agreement.

Both NPCA and the Charpieds argue that BLM erred by failing to take into account that title to the campsite/millsite lands had reverted to the United States because the terms of the reverter in the patent had occurred. Indeed, they presume that title to the lands has reverted and make further assumptions accordingly. *See, e.g.*, Charpieds' SOR at 2-3 (asserting that KEM's occupancy of these lands is trespass, and challenging the legality of a lease of surface rights issued by KEM to Statler). In view of the fact that BLM has agreed to deed its interest in the lands (whatever it may be) to KEM, this land exchange will resolve these questions once and for all. As noted above, BLM has valued the campsite/ millsite lands as if the land had already reverted to the United States. This moots the question of whether title to the lands has, in fact, reverted.

There is no doubt that the Charpieds were aware

of the precise "highest and best use" argument they chose not bring to the attention of the IBLA. They asserted this very same argument in earlier cases; *see, e.g., Donna Charpied*, 137 IBLA 45, 47 (1996). To quote the IBLA from that case,

> They [the Charpieds and others] contend that the appraisers *failed to consider that the Federal land to be exchanged is proposed to be used as a landfill, and that, as a result, the land should be ... valued in comparison to landfill sites*, instead of being treated as mine support lands....

Id. (emphasis added).

Notwithstanding their clear awareness of this "comparison" issue, the Charpieds did not raise it in this matter until they arrived in federal court, an acute violation of the exhaustion rule. Then, they finally hired their own appraiser-Stephen Roach-and offered to the district court new "evidence" on this new issue. Too late, fatally too late. NPCA recognizes this deficiency, claiming that to have raised this valuation issue to the IBLA would have been "futile." NPCA's Answering Brief at 56. Why futile? Because it did not work in the Charpieds' earlier case. In short, both decided not to pursue it here-but only the NPCA explains why.

B.

The Herzog Appraisal

Nevertheless, when they did insert this new issue

into the district court case, allegedly supported by an appraiser, Stephen Roach-who was never involved in the administrative process at all-BLM did what it would have done had it been given timely notice of this additional concern: they hired a *new* independent appraiser-Steven Herzog-to evaluate it. So much for futility. BLM instructed Mr. Herzog independently to review David Yerke's earlier 350 page appraisal "[i]n light of the *Desert Citizens* decision," referring to our opinion in *Desert Citizens Against Pollution v. Bisson,* 231 F.3d 1172 (9th Cir.2000). In that case, we held that the use of property should be "considered" in evaluating the highest and best use. *Desert Citizens,* 231 F.3d at 1180-84. The purpose of Mr. Herzog's report was to "supplement the administrative record."

Steven Herzog holds the designation of MAI from the Appraisal Institute. He is also a Certified General Real Estate Appraiser in California, a Registered Professional Forester, and the President of the Herzog Group. To assist him in this endeavor, he hired the Recon Research Corporation for its discount rate as applied to future income for landfill lands expertise, and EMCON, a civil engineering company with landfill experience.

Despite the Charpieds' fatally tardy assertion of this matter, Mr. Herzog did what BLM and *Desert Citizens* asked him to do: he thoroughly *considered* the value of the land in connection with its value as a landfill and filed his report accordingly. He concluded as of the relevant date that the landfill was "not a financially feasible use of the selected [federal] land." It follows that the "highest and best use" of the

federal lands being appraised could *not* have been for a landfill. He noted that as of 1993, "difficulties faced by landfill developers in obtaining required approvals impacted the ability and desire of companies to finance such projects." He pointed out that operators such as Waste Management, Inc., Western Waste, and BFI began to abandon their investments. He opined that "[t]he opportunity costs of investing tens of millions of dollars in a high-risk venture, without any return on that investment for at least ten years are enormous," and that "[a] knowledgeable investor with millions of dollars to invest would not have considered investment in a rail-haul landfill to be the route to obtaining a reasonable return on the investment."

So, if this is true, that there was no market for the federal lands as a landfill, why would Kaiser doggedly pursue this proposal? *Because Kaiser already owns the abandoned holes in the ground and the railroad necessary to serve it* and has a considerable investment in the project. The idea that someone else might purchase the selected federal lands for a landfill is palpably and demonstrably hallucinatory.

This is what Mr. Herzog has to say about Kaiser's determined motivation in a declaration provided to the district court summarizing his 108-page report (plus attachments) submitted to BLM:

> 61 . . . . Under this analysis, the net present value ["NPV"] of the income generated from the project would be $2.48 million. *Not* included in the calculation of this figure is

any allowance for entrepreneurial profit, the $13 million spent on permitting after September 25, 1997, the $17 million that would be required to upgrade the railroad and relocate and upgrade the paved road, or any allowance for on-site infrastructure cost and staffing. Consequently, the NPV for the net income to the landfill operation is dwarfed by the expenditures that would be required to obtain that income-a conclusion BFI obviously reached in 1994. Report pp. 106-107.

62. I reached the conclusion that, as of the effective date, landfill use was not financially feasible. Yet, Kaiser and its remaining associated investors went on to spend $13 million more pursuing final permits. Through 1994, approximately $49 million had been spent on the project. However, BFI had spent $45 million of that, and walked away. The remaining proponents had only $4 million invested, but the only way to recover any of the investment was to press on with the permitting effort. The internal dynamics of the stakeholders in the endeavor created a situation where motivations existed that were different from what a single entity, which had been solely financing the project from the beginning, would have faced. Report p. 108.

63. In addition, the expectation constantly existed that the time when final permits would be obtained was near at hand. The obtaining of the goal always seemed to be

near enough that continued expenditures were justified. To stop the process would have meant the forfeiting of all prior expenditures, because the final permits were needed to put the project in its most marketable condition. As noted earlier, the pending sale is contingent upon final permits being obtained and all litigation being resolved. Report p. 108.

64. The conclusion of Mr. Roach that a landfill was economically feasible is based completely on the observation that Kaiser was investing in a landfill at the site. First, this "observation" is not a proper method of assessing the economic feasibility of a landfill use. See definition of economic feasibility at ¶ 11. Moreover, this "observation" does not consider the circumstances and history of Kaiser's investment in the project or the fact that Kaiser, since it owned the railroad, the permits, and other aspects of the project related to the selected lands, had different motivations than others in the marketplace would have had. Mr. Roach's conclusion appears to be without market support, and is based on an incomplete understanding of the factors motivating Kaiser to continue to invest in Eagle Mountain.

Kaiser is correct when it argues that BLM's chief state appraiser in California, Nancy Ortiz, reviewed Mr. Herzog's report and said in a 12-page report:

From my review it appears that Mr.

> Herzog has been conscientious in providing an independent analysis and his report meets applicable [UAS] and Federal standards and **the requirements of the instructions for the assignment provided by the BLM. He has thoroughly analyzed the subject's potential for landfill as a highest and best use, using appropriate methods and consultants, and provided a feasibility conclusion based on his analysis. As the reviewer, I believe that the appraiser has addressed concerns relative to the landfill as a potential highest and best use....**

The BLM District Manager added this perspective to Mr. Herzog's appraisal:

> We feel the administrative record supports BLM's decision in this case, and disagree with Plaintiff's assertions to the contrary. However, in light of the Ninth Circuit's opinion in Desert Citizens, we felt an independent analysis of whether a landfill was the highest and best use of the federal lands was justified. We were prepared to accept the results of this new analysis, regardless of its implications to the District Manager's decision of September 25, 1997.

In conclusion, he said, "I have reviewed Mr. Herzog's report and found nothing which indicates that it is necessary to revise or revisit the District Manager's decision of September 25, 1997 approving the exchange." This decision was served on the Charpieds in January, 2003; and Mr. Herzog's report, plus the

reports of the chief appraiser and the district manager were formally made part of the administrative record and officially certified and lodged as such with the district court on February 7, 2003. How my colleagues can claim that this is not a "final, appealable decision" is a mystery.

Did the plaintiffs timely appeal the District Manager's final conclusion to the IBLA, as they could have pursuant to 43 C.F.R. § 4.410(a)? No. This failure alone should bar them from bringing it sideways into this case. So what the Charpieds say BLM did not do *has in fact been done,* and remains unchallenged by them.

We faced a similar problem in *Warm Springs Dam Task Force v. Gribble,* 621 F.2d 1017 (9th Cir.1980). In that case, a deficiency in the Army Corps of Engineers NEPA process had been cured during litigation. Calling these "supervening events," we denied remand to the Corps because the Corps had already conducted studies definitively to answer the matter at issue. *Id.* at 1026. As we said in *Friends of the Clearwater v. Dombeck,* 222 F.3d 552, 560 (9th Cir.2000), "if extra-record evidence shows that an agency has rectified a NEPA violation after the onset of legal proceedings, that evidence is relevant to [what] relief should be granted." *See also Forest Guardians v. U.S. Forest Serv.,* 329 F.3d 1089, 1095-96 (9th Cir.2003). At the very least, we should follow this example. BLM has done what we suggested in *Desert Citizens.* It has thoroughly "considered" the issue and issued a manifestly defensible answer. To remand at this point is a clear exercise in blind form over substance.

CONCLUSION

I end with the Technical Advisory Panel's evaluation: "the proposed Eagle Mountain Landfill could well become one of the world's safest landfills and a model for others to emulate." Don't hold your breath.

APPENDIX B
District Court Opinion

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA -
EASTERN DIVISION

DONNA CHARPIED, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	ED CV 99-0454 RT (Mcx) ED CV 00-0041 RT (Mcx) ORDER (1) GRANTING IN PART AND DENYING IN PART PLAINTIFFS DONNA AND LAWRENCE CHARPIEDS' ("CHARPIEDS') MOTION FOR SUMMARY JUDGMENT IN CASE NO. ED CV 99-0054 RT (Mcx); (2) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR . SUMMARY JUDGMENT IN CASE NO. ED CV 99-0054 RT (Mcx); (3) GRANTING IN PART AND DENYING IN PART PLAINTIFF NATIONAL PARKS AND CONSERVATION ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT IN CASE NO. ED CV 00-0041 RT (Mcx); (4) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN CASE NO. ED CV 00-0041 RT (Mcx); (5) ENJOINING DEFENDANTS FROM CERTAIN ACTION; (6) REMANDING BOTH ACTIONS TO THE BUREAU OF LAND MANAGEMENT FOR PROCEEDINGS CONSISTENT WITH THIS ORDER; AND (7) RESERVING JURISDICTION
NATIONAL PARKS AND CONSERVATION ASSOCIATION, Plaintiff, v. BUREAU OF LAND MANAGEMENT, et al., Defendants.	

The court, Judge Robert J. Timlin, has read and considered plaintiffs Donna Charpied and Lawrence Charpied ("the Charpieds"), the Desert Protection Society, the Center for Community Action and Environmental Justice, and the National Parks and Conservation Association ("NPCA") (collectively, "Plaintiffs")' motions for summary judgment with respect to the Charpieds' Second Amended Complaint ("SAC") and the NPCA's First Amended Complaint ("FAC"),[1] defendants U.S. Department of the Interior ("DOI"), Bureau of Land Management ("BLM"), Kaiser Eagle Mountain, Inc. ("Kaiser"), and Mine Reclamation Corporation ("MRC") (collectively, "Defendants")' joint motion for summary judgment with respect to the Charpieds' SAC and the NPCA's FAC, and all opposition and reply papers. Finally, the Court has considered the underlying administrative record. Based on such consideration, the court concludes as follows:

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[1] 'The Charpieds' SAC and the NPCA's FAC seek review of the same BLM administrative actions. Although no motion for consolidation was ever brought in these actions, pursuant to stipulation of all parties and by order of this court, the parties briefed at the same time the issues presented by both the Charpieds' SAC and the NPCA's FAC. This order on the parties' respective summary judgment motions, therefore, is dispositive as to both the Charpieds' action (ED CV 99-0454 RT (Mcx)) and the NPCA's action (ED CV 00-0041 RT (Mcx)).

I.

BACKGROUND

The Charpieds filed a Second Amended Complaint ("SAC) against Defendants DOI, BLM, National Park Service ("NPS"), Gale Norton, Secretary of the DOI, Kathleen Clarke, Director of BLM, Mike Pool, California State Director of BLM, Linda Hansen, Acting California Desert District Manager of BLM, Fran Mainella, Director of NPS, Kaiser and MRC alleging violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701, *et seq*-* the National Park Service Organic Act, 16 U.S.C. § 1, *et seq.*, and the California Desert Protection Act, 16 U.S.C. § 410aaa-21, *et seq.*, and seeking declaratory and injunctive relief, as well as attorneys' fees and costs.

The NPCA filed a First Amended Complaint ("FAC") against Defendants DOI, Kaiser and MRC alleging similar violations and seeking the same type of relief.

II

UNCONTROVERTED MATERIAL FACTS

The following facts are uncontroverted material facts supported by admissible evidence:

Eagle Mountain Landfill and Recycling Center Project ("Project") is a "Class III non-hazardous solid

waste landfill" proposed on the site of an unreclaimed, inactive open-pit iron ore mine owned by Kaiser and leased to MRC. The proposed Eagle Mountain Landfill site comprises approximately 4,654 acres, of which about 2,164 acres will be used for disposal of waste. The inactive mine consists of four large open pits, each approximately one to two miles long, three of which will not be part of the Project and, therefore, will not be reclaimed in any manner by the Project. As part of the mining operation, Kaiser developed a 52-mile long privately owned rail line connecting the mine site to the main line of the Southern Pacific Railroad.

The mine is located in Riverside County, California ("the County").

The mine is bordered on the north, west, and southwest by the Eagle Mountains and on the east and southeast by the Chuckwalla Valley. The southern and eastern boundaries of Joshua Tree National Park ("Joshua Tree") are, in certain places, less than two miles from the mine.

Joshua Tree contains unusual desert plants and animals and spectacular geologic features, is part of an International Biosphere Reserve, is designated as a Class I airshed under the federal Clean Water Act, and provides important habitat for bighorn sheep, desert tortoises, deer, coyotes, bobcats, mountain lions, and a wide range of birds and reptiles.

The vast majority of Joshua Tree's 794,000 acres is designated or being managed as wilderness areas.

BLM is authorized to dispose of public lands by exchange under Section 206(a) of FLPMA.

In 1989, Kaiser submitted an application to BLM for a land exchange to facilitate the construction and operation of the Eagle Mountain Landfill.

Because the proposed landfill also required approvals from the County, Kaiser filed applications with the County on or about June 8,1989, requesting the necessary local approvals for the landfill, including zoning change, a specific plan of land use, and an amendment to the comprehensive general plan.

The land exchange was a "major Federal action having a significant impact on the quality of the human environment" under NEPA. Thus, BLM prepared an Environmental Impact Statement ("EIS") pursuant to 42 U.S.C. § 4332(2)(C).

The County and BLM worked together to prepare a joint Federal ElS/California State Environmental Impact Report ("EIS/EIR"). In 1992, the BLM and the County issued a Joint Final EIS/EIR analyzing the environmental effects of the landfill project.

During the preparation of the 1992 Final EIS/EIR, NPS expressed concerns about the impact of the Project on Joshua Tree. On or about July 26,1994, the California Superior Court for the County ("State Court") found the 1992 Final EIS/EIR deficient under the California Environmental Quality Act ("CEQA") and ordered that the County vacate its permits and prepare a new EIR. On or about March

10, 1995, BLM requested that the Interior Board of Land Appeals of the DOI ("IBLA") IBLA remand the matter to BLM in order to give it jurisdiction to enable it to join the County in preparing a new EIS/EIR. On or about April 27,1995, IBLA granted BLM's request, vacated the Record of Decision ("ROD"), and remanded the matter to the BLM. On or about May 12,1995, BLM asked the NPS to be a "cooperating agency" in the preparation of the new EIS/EIR and NPS agreed to so act on or about June 20,1995.

On or about April 10, 1996, BLM requested an updated independent appraisal of the land to be exchanged and the reversionary interest held by the United States in land patented to Kaiser in 1955.

On or about June 14,1996, NPS provided BLM with follow-up comments on the Draft EIS/EIR.

On or about September 25,1996, David Yerke completed his updated independent appraisal of the land to be exchanged, including the reversionary interest held by the United States in land patented to Kaiser in 1955.

In January, 1997, BLM approved the 900-page final EIS/EIR.

On or about April 28,1997, BLM approved the updated independent appraisal. BLM concluded that the updated appraisal met all applicable standards and accurately reflected the value of the selected public lands and the offered lands.

On September 25,1997, BLM's California Desert District Office Manager Henri R. Bisson issued a ROD approving the land exchange between Kaiser and BLM and announcing a final decision issuing the two rights-of-way to Kaiser would be withheld "pending receipt and review of any protest to the land exchange."

On December 9,1998 the California State Director, BLM approved the issuance of the two rights of way.

On or about January 11,1999, the Charpieds and NPCA noticed their appeal to the IBLA from BLM's denial of their protests to the land exchange, and challenged BLM's decision to grant certain rights-of-way.

On September 30,1999, the IBLA Administrative Judge David L. Hughes issued an opinion denying the appeals of the Charpieds and NPCA and affirming the BLM land exchange and BLM's approval of the rights-of-way.

In October 1999 the subject land exchange was effectuated by the filing of grant deeds with the County Recorder.

III.

ANALYSIS

A. Subject Matter Jurisdiction

Defendants contend that this court does not have subject matter jurisidiction over the instant action

because (1) Plaintiffs have failed to exhaust their administrative remedies, and (2) Plaintiffs have failed to seek judicial review of the proper administrative decision.

1. Exhaustion of Administrative Remedies

a. FLPMA Claim

Defendants contend that Plaintiffs have failed to exhaust their administrative remedies with respect to their FLPMA claim. Specifically, Defendants assert that Plaintiffs are barred from urging that a landfill should have been considered as the highest and best use of the exchanged lands because that contention was not first presented to the IBLA.

Defendants' position is without merit. In its brief on appeal to the IBLA, NPCA stated the following:

> Any disposal of federal land must be compensated at "fair market value of the use of public lands and their resources." 43 U.S.C.A. § 1701 (a). Here, the compensation being offered in exchange for the public lands in question is inadequate, and egregiously low. As part of the land exchange, BLM will hand over 3,481 acres of federal land just outside Joshua Tree, providing the bulk of lands needed by Kaiser for the proposed Landfill. In return, Kaiser will transfer 2,486 acres of private land to BLM. To compensate for the

> approximately 1,000-acre differential, Kaiser will also pay BLM a lump sum of $20,100, which is well below the fair market value. Kaiser anticipates huge profits from a landfill operation on the undervalued BLM land, well beyond the $20,000 amount that would be paid for approximately one third [sic] of the property. Here again, Kaiser and a few other parties will benefit at a significant cost borne by the national treasury.

AR 06033. The court concludes that the above language sufficiently presented to the IBLA the claim that a landfill should have been considered as a highest and best use of the exchanged lands, because it gave the IBLA the opportunity to consider the identical issue brought before this court. *See Kern v. U.S. Bureau of Land Management*. 38 F.Supp.2d 1174,1180 (D.Or. 1999), *rev'd on other grounds*, 284 F.3d 1062 (9th Cir. 2002).

Further, whether the issue was presented to the IBLA by only one plaintiff is inconsequential. So long as an issue is raised by *some* party at the administrative level, it can be raised by another party on judicial review. *See Id.* at 1180 ("[s]o long as the agency properly had the opportunity to consider the objection, it has no reason to challenge the bringing of such objection before the a court by another party."); *see also Buckeye Cable Vision v. U.S.*, 438 F.2d 948, 951 (6th Cir. 1971) (so long as agency "had an opportunity to consider the identical issues in [the] case but which were raised by other

parties,... it was not necessary for [plaintiff] to raise them again before the [agency].")

Finally, the court notes that it is not necessary for Plaintiffs to have presented to the IBLA every issue before this court, so long as the issue was raised at some point during the administrative process. Defendants' reliance on *Marathon Oil Co. v. United States*, 807 F.2d 759 (9th Cir. 1986), is misplaced. Contrary to Defendants' assertion, *Marathon Oil* does not support the proposition that all issues presented to this court must have been first presented to the IBLA. *See Id.* at 767 (finding issue not properly preserved because appellant failed to raise the issue at *any* point during the administrative process: "[Appellant] failed to raise the issue during the public hearing *or* during the 30-day comment period *or* in its appeal from the initial order" (emphases added)).

For the aforementioned reasons, the court concludes that Plaintiffs properly exhausted their administrative remedies with respect to their FLPMA claim.

b. NEPA Claim

Defendants also contend that Plaintiffs have failed to exhaust their administrative remedies with respect to their NEPA claim.

As discussed above, Plaintiffs need only have raised the NEPA issues it now raises before this court at *some* point during the administrative process. The record reflects that Plaintiffs first raised all of the NEPA issues before this court during the

administrative process. *See* AR 50290 (eutrophication); AR 6063-6064 (noise); AR 6064-6065 (night lighting); AR 6066 (visual impacts); AR 6064,6074 (desert tortoises); AR 19076 (groundwater); AR 6067 (air quality); AR 6074-6075 (Bighorn sheep).

Therefore, the court concludes that Plaintiffs properly exhausted their administrative remedies with respect to their NEPA claim.

2. Appeal of BLM Decision

Defendants further contend that the decision of the BLM, of which Plaintiffs seek judicial review, is not a final agency decision under the federal Administrative Procedures Act ("APA"), and therefore not subject to review by this court.

Under the APA, the only agency decision that is subject to judicial review is the final agency decision. An ROD issued by an administrative agency constitutes final agency action for purposes of the APA. *See, e.g., Sierra Club v. Slater*. 120 F.3d 623, 631 (6th Cir. 1997), *accord, Oregon Natural Resources Council v. Harrell*. 52 F.3d 1499,1504 (9th Cir. 1995).

In *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000), plaintiffs challenged under the FLPMA a BLM decision to enter into a land exchange with a private party. In reviewing the district court's order, which dismissed the action on the ground that plaintiffs lacked standing and, in the alternative, denied the motion for preliminary

injunction, the Ninth Circuit stated that plaintiff was appealing from the BLM's decision, and not from the decision of the IBLA:

> [Plaintiffs] initially pursued administrative remedies. Upon dismissal of the action by BLM's State Director, the environmental groups jointly appealed to the [IBLA] and petitioned for a stay pending appeal. IBLA rejected the consolidated appeals and the request for a stay. [Plaintiffs] brought the instant case under the APA... [T]he complaint... alleged that the land exchange was arbitrary, capricious and *an abuse of BLM's discretion and exceeded the statutory limitations on BLM's authority* [emphasis added] to exchange public lands under FLPMA. [Plaintiffs] requested . . . *that the ROD approving the exchange be declared unlawful and set aside* [emphasis added] by the district court. In addition, the complaint requested preliminary injunctive relief prohibiting BLM . . . from taking any further steps to complete the exchange based on the ROD.

Id. at 1175. The opinion does not indicate that the Ninth Circuit or the district court reviewed the decision of the IBLA.

Moreover, appeal from a "final agency decision" is a prerequisite for subject matter jurisdiction under the APA. Lack of subject matter jurisdiction may be raised by any party at any stage of federal litigation, including on appeal. *See Morongo Band of Mission*

Indians v. California State Board of Equalization. 858 F.2d 1376, 1380 (9th Cir. 1988); *see also Attorneys Trust v. Videotape Computer Products, Inc.*, 93 F.3d 593, 594-595 (9th Cir. 1996). Subject matter jurisdiction may also be raised by both the district courts *and* appellate courts *sua sponte*. *See Morongo Band of Mission Indians*, 858 F.2d at 1380. ("The fact that none of the parties contests the district court's jurisdiction does not... relieve us of our responsibility to determine whether the exercise of jurisdiction was proper."); *see also Jenkins v. McKeithen*, 395 U.S. 411,421, 89 S.Ct. 1843,1849 (1969).

Because the court in *Desert Citizens* 1) stated that plaintiff requested, *inter alia*, that the ROD approving the exchange be declared unlawful and set aside, and 2) did not raise the issue of subject matter jurisdiction *sua sponte*, this court construes the Ninth Circuit's decision in *Desert Citizens* to review the BLM's ROD and *not* the decision of the IBLA supports the proposition that a BLM ROD is a "final agency action" under the APA, subject to review by district courts.

Therefore, this court concludes that it has subject matter jurisdiction over Plaintiffs' FLPMA and NEPA claims, and will address the merits of each claim.

C. Summary Judgment

Under Rule 56(c) of the Federal Rules of Civil Procedure, a district court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together

with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Plaintiffs and Defendants have filed cross-motions for summary judgment. However, as more than one court has noted, "[w]hen acting as a court of appeal [under the APA], it is improper for a district court to use methods and procedures designed for trial." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560,1564 (10th Cir. 1994); *see also Lodge Tower Condominium v. Lodge Properties, Inc.*, 880 F.Supp. 1370,1374-75 (D.Colo. 1995). As the court in *Lodge Tower Condominium* explained:

> Because a district court's function in reviewing administrative action is different from the function it usually performs as a trier of fact, some of the procedures designed to prepare a case for trial do not work well when the court is reviewing agency proceedings. Specifically, a motion for summary judgment under [R]ule 56 of the Federal Rules of Civil Procedure . . . makes no procedural sense when a district court is asked to undertake judicial review of administrative action. Such a motion is designed to isolate factual issues on which there is no genuine dispute, so that the court can determine what part of the case must be tried to the court or a jury. ... Agency action, however, is reviewed, not tried.

Lodge Tower Condominium, 880 F.Supp. at 1374 (citations omitted).

Accordingly, this court will construe Plaintiffs' motions for summary judgment under Rule 56 as motions to set aside the BLM's ROD and all actions taken in furtherance thereof including the approval and acceptance of the Final EIS/EIR and to remand this proceeding to the BLM with directions to take action consistent with this court's eventual disposition. Conversely, this court will construe Defendants' motions for summary judgment as motions to uphold the BLM's ROD and its approval and acceptance of the Final EIS/EIR.

D. Standard of Review

This action is brought pursuant to the APA, which provides for judicial review of agency actions. 5 U.S.C. § 702. Under the APA, an agency's action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The reviewing court must consider whether the agency acted within the scope of its legal authority, adequately explained its decision, based its decision on facts in the record, and considered the relevant factors. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360,378,109 S.Ct. 1851,1861 (1989); *Western Radio Services Co. v. Espy*, 79 F.3d 896,900 (9th Cir. 1996). The reviewing court may not substitute its judgment for that of the agency. *Marsh* at 376,109 S.Ct. at 1860.

E. FLPMA Claim

The Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1716, requires the BLM, as part of the land exchange process, to: (a) make a determination that the public interest will be well-served by the land transfer, and (b) find that the lands to be exchanged are of equal value, taking into consideration any cash included as part of the exchange. *Id.*

1. Public Interest

In determining the public interest, the Secretary of the Interior ("Secretary") is to "give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife...," and generally compare the value and objectives of the land in federal ownership with the value and objectives of the land in private ownership, if acquired. 43 U.S.C. § 1716(a) ("Section 1716(a)").

Section 1716(a) is explicit: the Secretary is required to give "full consideration" to certain needs of the Federal and State governments, as well as local people. However, the statute does not explain the meaning of "full consideration," Further, the parties do not cite, and this court is unable to find any judicial authority which construes the meaning of "full consideration." It is therefore the task of this court to determine if the BLM, as evidenced by the

ROD, gave "full consideration" to relevant statutory factors, as that term is used in Section 1716(a).

The BLM's ROD is lengthy. Of particular relevance is Section 4.0, entitled, "Management Considerations." AR 19068. The section begins with the director's conclusions:

> Based upon careful examination of the EIS/EIR, Federal comment, and after consultation with the NPS/JTNP, Biological Resources Division U.S. Geological Survey, the County of Riverside, and other appropriate Federal, State agencies, and local government agencies, I have concluded that the proposed action is consistent with BLM management goals and complies with FLPMA.... It is my determination that the acquisition of non-Federal land exceeds the values of Federal lands and interest to be conveyed. I also find that the use of the conveyed lands subject to mitigation and monitoring described in the EIS/EIR will not significantly conflict with established management objectives on adjacent Federal lands and nearby Federal lands.

AR 19068. The section goes on to highlight eighteen specific factors that the director considered in making his decision. AR 19068-19083.

Defendants contend that the public interest determination "considered all of the relevant factors and fell well within the range of discretion allowed

under FLPMA." The court concludes, however, that the ROD does not evidence that the BLM gave such factors "full consideration," as required by Section 1716(a). Rather, the BLM focuses mostly on mitigation, rather than taking a hard look at the environmental impacts of the land exchange, of the rights of way grants and the reversionary interest grants (hereinafter "land interest grants") and the planned landfill. For example, the BLM discusses acquiring 400 acres of desert tortoise habitat for mitigation of impacts caused by the Project. AR 19068. Additional mitigating measures discussed are portable litter fences, litter patrol, and minimization of the landfill face, AR 19073. However, in the discussion of these and other mitigation measures, there is no full analysis of the overall impact of the landfill. Where the record relates to impact on the wilderness experience, the BLM vaguely states that the Project "can" have an adverse impact on an individual's wilderness experience, but that the wilderness experience is subjective. AR 19073. Such language does not evidence "full consideration" as required under Section 1716(a).

As they do throughout their motions for summary judgment, Defendants contend that the IBLA decision is the final order from which judicial review is proper under the APA and that the IBLA properly upheld the BLM's determination that the public interest is well served by the completion of the land exchange and land interest grants.

As discussed above, the Ninth Circuit has concluded that the BLM's ROD is a final agency decision for purposes of the APA. Furthermore, even

if the IBLA's decision were the decision from which judicial review was proper, the court would reach the same conclusion, as the IBLA engaged in the same insufficient, conclusory analysis as the BLM. For example, the IBLA states:

> It is clear that, in assessing whether the "public interest" may be "well served" by completing the exchange, the use to which the selected public lands will be put by the private party is an important concern. The present case is a good example, where, as a result of granting the exchange, municipalities will have landfill capacity into the next century. This is in addition to the more direct benefit whereby habitat for protected species will be preserved in public ownership.

AR 50179. While "landfill capacity" and "habitat for protected species" are benefits of the proposed land exchange, whether such benefits outweigh the potential detriments is an issue that is addressed only conclusorily. Although Defendants may have addressed all of the relevant factors, both the BLM's ROD and the IBLA's decision do not evidence a serious balancing of such factors in a substantial comparative analysis.

Further, the use of "magic words" is not dispositive. For purposes of judicial review, *what* a federal agency ultimately concludes with respect to a particular project is less important than *why* it so concluded. It is impossible for a court to engage in meaningful judicial review under the APA unless the

federal agency at issue explains the bases for its conclusions. The BLM explanations of its conclusions as to public need are severely deficient. Accordingly, these actions will be remanded to the BLM with directions to 1) fully consider whether the proposed land exchange is in the public interest, and 2) fully articulate the factors it considered and the reasons for its conclusion.

2. Equal Value

To ensure that lands to be exchanged are of equal value, Section 206(d) of the FLPMA directs the Secretary to obtain and consider an appraisal of the affected lands' market value.

An appraisal prepared for land exchange purposes must contain certain information in order to comply with the regulations. The regulations require that the appraisal contain, among other things, an analysis of the "highest and best use" of the properties to be exchanged. "Highest and best use" is defined as the most probable legal use of the property, based on market evidence as of the date of valuation, expressed in an appraiser's supported opinion. 43 C.F.R. 2200.0-5(k). Before it can be concluded that any use for the property is its highest and best use, the use must be "physically possible, legally permissible, financially feasible" and "result in the highest value." *Desert Citizens Against Pollution*, 231 F.3d at 1181. While uses that are merely speculative or conjectural need not be considered, uses that are "reasonably probable" *must* be analyzed as a *necessary* part of the highest and best use determination. *Id.*

The regulations also require that an appraisal contain an estimate of "market value," which is defined as the most probable price in cash, or terms equivalent to cash, that lands or interests in lands should bring in a competitive and open market under ail conditions requisite to a fair sale, where the buyer and seller each acts prudently and knowledgeably, and the price is not affected by undue influence. 43 C.F.R. 2200-5(n). In estimating the market value of the land, the regulations further require that the appraiser: (1) determine the highest and best use of the property to be appraised, and (2) estimate the value of the lands and interest as if in private ownership and available for sale in the open market. 43 C.F.R. 2201.3-2(a)(1)-(2).

Plaintiffs contend that BLM's approval of the land exchange was arbitrary and capricious, an abuse of discretion and not in accordance with the law because the appraisal upon which it relied "flagrantly undervalued" the public lands to be exchanged in violation of federal law. Specifically, Plaintiffs contend that BLM failed to consider (1) the lands' "intended use" as a landfill, and (2) "the income generating value of the campsite/millsite lands as used for state prison and associated purposes" when determining its market value, resulting in an exchange where "the value of the public lands conveyed... greatly exceeded the value of the private lands acquired."

Defendants contend that (1) although BLM did not consider a landfill as a potential highest and best use, BLM nevertheless properly determined the "highest and best use" of the public lands, and (2)

BLM's determination of the lands' market value was proper.

Both of Defendants' contentions are without merit. The court concludes that BLM's failure to consider an income producing landfill as a potential highest and best use was an abuse of discretion, given that evidence available prior to the undertaking of the appraisal indicated that the selected lands were expected to be used for landfill purposes. *See Desert Citizens Against Pollution*, 231 F.3d at 1181. First, as in *Desert Citizens*, "the use of the land as a landfill was not only reasonable, it was the specific intent of the exchange that it be used for that purpose." *Id.* at 1184. Second, substantial steps had been taken to turn the selected lands into a landfill. Specifically, as early as 1989, Kaiser had proposed the construction and operation of the Eagle Mountain Landfill, and had filed applications with Riverside County requesting the necessary local approvals for the landfill, including zoning change, a specific plan of land use, and an amendment to the comprehensive general plan. Despite this, the appraisal expressly stated that it did not take into consideration such use *or* the potential value of such use. *See* Appraisal, Vol. I, p. 5: AR 52:34645; Appraisal, Vol. I, p. 43: AR 52:34683 ("The opinions of value expressed within this appraisal report do not take into consideration any aspects of the proposed landfill project."); *see also Desert Citizens Against Pollution*, 231 F.3d at 1182 ("It is especially noteworthy that a section of the [appraisal] fully acknowledged the likelihood of the future landfill, noting: "Currently, there are plans for the mine to become part of a major landfill facility that will serve

primarily the Los Angeles basin." ... The fact that [such] information was included in the appraisal report but was not addressed in the section dealing with highest and best use is particularly troubling.")

Defendants' second contention, that BLM's determination of the lands' market value was proper irrespective of the failure to consider its value as a landfill, is equally without merit. As discussed above, the appraiser is first required to determine the highest and best use of the property, then appraise the property as if in private ownership and available for sale in the open market. Defendants do not cite, and this court is unable to find, any support for the proposition that an appraiser does not have to properly determine the highest and best use of the property if, as Defendants contend, "it would not alter the 'conclusions' of the appraisal, [or] BLM's decision to transfer the property."

For the reasons stated above, the Court concludes that BLM's ROD was arbitrary, capricious, an abuse of discretion and not in accordance with law and will grant Plaintiffs' motions for summary judgment and deny Defendants' motions for summary judgment as to the FLPMA claim.

F. NEPA Claim

NEPA requires federal agencies to prepare an environmental impact statement ("EIS") for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) ("Section 4332(2)(C)"). Under

Section 4332(2)(C) all agencies of the Federal Government shall:

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

A challenge to the adequacy of an EIS is reviewed under the "rule of reason" to "determine whether the agency has engaged in a 'reasonably thorough discussion of the significant aspects of probable environmental consequences.'" *American Rivers v. FERC*, 201 F.3d 1186,1195 (9th Cir. 2000) (quoting

Oregon Natural Resources Council v. Lowe, 109 F.3d 521,526 (9th Cir. 1997)). Under this standard, once a reviewing court is "satisfied that a proposing agency has taken a hard look at a decision's environmental consequences, [its] review is at an end." *Idaho Conservation League v. Mumma*, 956 F.2d 1508,1519 (9th Cir. 1992). Considerable deference must be accorded to the agency with regard to the manner in which it examines the environmental consequences of a project. *Morongo Band of Mission Indians v. Federal Aviation Administration*. 161 F.3d 569,573 (9th Cir. 1998).

Plaintiffs contend that the Defendants EIS violated NEPA "because it failed to adequately address [the land exchange's and land interest grants'] impacts on eutrophication, noise, night lighting, visual impacts, desert tortoises, groundwater, air quality, and Bighorn sheep." Plaintiffs further contend that the EIS violates NEPA because it "fails to consider a reasonable range of alternatives" to the land exchange. Defendants contend that the EIS "fully addressed" all areas of environmental concern, and as such meets the requirements of NEPA. Defendants also contend that BLM's definition of the "purpose and need" of the land exchange and its analysis of the alternatives to the project satisfies all of the requirements of NEPA.

2. Specific Environmental Impacts

(i) Eutrophication

Plaintiffs contend that BLM neglected to address significant impacts on the environment due to

eutrophication including an increased presence of scavenger raven and coyote populations, impacts on bird, mice, and other small animal feeding habits due to the nutrients from the landfill and windblown trash, and irreparable impacts on the desert food chain.

Plaintiffs and Defendants disagree about the definition of eutrophication. Plaintiffs assert that eutrophication means "an addition of nutrients," properly applied to aquatic systems, but improperly used by Defendants in a broad sense to refer to the large-scale addition of nutrients in landfill trash to the desert ecosystem. AR 50643-4. Defendants assert that eutrophication is a consequence of atmospheric nitrate deposition from the emission and transport of anthropogenically generated nitrogen compounds. AR 43861. Defendants state that sources include agricultural emission of ammonia/ammonium and organic nitrogen from animal wastes and fertilizer applications, and oxides of nitrogen emitted from fossil fuel combustions. AR 43861.

If either definition is used, the administrative record shows that Defendants failed to take a hard look at the consequences of nitrate deposition, in violation of NEPA. The section in the EIS begins with a discussion of Defendants' definition of eutrophication, followed by a discussion of why it is a concern. The section goes on to note that:

> The small amounts of nitrate produced as a result of fossil fuel use associated with landfill operation would be eclipsed by the amount of nitrate produced in the Los

> Angeles Basin and in urban desert communities closer to the landfill. ... [N]itrates from fossil fuel combustion [generated by visitors to JTNP who arrive by automobile] is expected to be greater than that produced by landfill operations.

AR 43861. General statements that eutrophication brought about by the Project will introduce less nitrate into JTNP than other sources of nitrate and that nitrate levels from fossil fuel combustion are *expected* to be greater than that produced by landfill operations do little to inform the agency and the public of the impact of the *overall* increase in nitrate levels as a result of the Project. The draft EIS also concludes:

> [N]itrate is transported by prevailing winds, which are westerly in the vicinity of the proposed Project. Because the landfill is southeast of JTNP, nitrates generated from landfill operations would be transported away from JTNP rather than toward it. . . . Nitrate deposition associated with landfill operations, therefore, is expected to have no effect on ecosystem function [in] JTNP.

AR 43861. However, this conclusion only examines the impact on JTNP, and not on the overall environment.

The record also indicates that Defendants failed to take a hard look at the issues presented under Plaintiffs' definition of eutrophication. The EIS only

cursorily mentions that changes in predator/prey relationships could adversely affect prey species from increased food availability from the landfill, without any discussion of the extent of the potential impact. AR 43860. While Response to Comment 1-153 states that "[p]roject design and mitigation measures that will prevent access to refuse by various animals that might otherwise consume it will make the amounts of nutrient additions to the local ecosystem so small that these amounts are immeasurable and do not constitute a significant adverse impact on ecosystem function." AR 46842. This assertion is not supported by any data. Under NEPA, the agency must consider cumulative impacts using some quantified or detailed information, such that the courts and the public can be assured that the agency took the "hard look" that is required of it. *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372,1380 (9th Cir. 1998). Defendants have failed to demonstrate that they used adequate quantified or detailed information sufficient to satisfy NEPA's requirements regarding the effects of the Project on the eutrophication aspect of the environment.

(ii) Noise, Night Lighting, and Visual Impacts

Plaintiffs further urge that Defendants failed to take a hard look at the environmental impacts related to noise, night lighting, and visual experience. However, a review of the record confirms that Defendants did indeed take a hard look at all three, and thus complied with NEPA in these respects.

In contrast to the section of the EIS on eutrophication, the sections on noise, night lighting, and visual impacts are all lengthy, comprehensive, and evidence a good faith effort by Defendants to address legitimate environmental concerns. For example, assessing visual impacts "involved development of computer simulations showing before-and-afiter views from eight 'key observation points'." To assess the impact of night lighting, the BLM commissioned a study which concluded that such "nightglow" would only be perceptible "in the immediate vicinity of the Project site." AR 46685.

The section on noise is replete with evidence of scientific measurements and analysis:

> The train-related noise level at the JTNP wilderness boundary is calculated to be 30 dBA CNEL. The existing noise at the wilderness boundary was measured to be approximately 39 dBA CNEL.

AR 43974. With respect to the potential noise generated by trucks, the section states:

> Project-related traffic noise is expected to increase the noise levels at the JTNP eastern boundary, which is the boundary nearest the Eagle Mountain Road, by approximately 5 dBA. Noise levels at the wilderness boundary are expected to increase by 1 dBA, which is a level of increase generally indiscernible to the human ear.

AR 43981.

Such discussion, containing measurements generated by studies commissioned to study these particular concerns, as well as extensive mitigation measures, lead the court to conclude that Defendants did take the required hard look. While Plaintiffs may disagree with Defendants conclusions, such disagreement is of no moment. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553,98 S.Ct. 1197,1216 (1978) (NEPA does not allow a court to overturn an agency action because it disagrees with the agency's decision or with its conclusions about the scope, breadth, or effect of the environmental impacts of the project at issue.)

(iii) Desert Tortoises

Plaintiffs contend that the EIS improperly ignored adverse impacts from the landfill on the desert tortoise. The court finds that Defendants have satisfied the hard look requirement of NEPA with respect to the Project's potential impact on the desert tortoise.

Ninth Circuit precedent is clear: NEPA requires disclosure of a project's impacts on wildlife habitat. *See Marble Mountain Audubon Soc'y v. Rice*, 914 F.2d 179,182 (9th Cir. 1990); *see also Utahns for Better Transportation v. United States Dep't of Transp.*, 305 F.3d 1152,1180 (10th Cir. 2002). In their EIS, Defendants disclosed that desert turtle habitat loss would occur from access road improvements and from loss of approximately 1,038 acres of currently

undisturbed habitat at the landfill site. AR 43860. The EIS further states that the habitat could be fragmented by the reactivation of Eagle Mountain Railroad, and the potential changes in the predator/prey relationships which could adversely affect the desert tortoise, resulting from increased food availability associated with the landfill. AR 43860. As such, Defendants adequately disclosed in the EIS the project's impacts on the habitat of the desert tortoise, in compliance with NEPA.

Defendants also thoroughly addressed in the EIS mitigation measures with regard to the impacts on the desert tortoise. According to Defendants, "BLM and Riverside County retained an independent consulting firm to undertake an unprecedented study; a survey of the mitigation measures contained in every biological opinion issued by the FWS for projects in California and Nevada where the desert tortoise could have been affected." Defendants' mitigation measures include defining work zones to minimize impacts to tortoises, on-site monitors to move tortoises out of harm's way, tortoise fences, tortoise culverts for highway crossings, installation of ballasts to reduce fragmentation, removal of road-kills to avoid feeding of tortoise predators, and chemical deterrence of ravens. AR 45630-1.

(iv) Groundwater Quality

Plaintiffs contend that BLM's treatment of groundwater issues in the EIS are inadequate in terms of both quality and quantity, and that the planned groundwater monitoring program is inadequately described.

NEPA requires disclosure of a project's impacts on water quality. *See Sierra Club v. U.S. Forest Service*, 843 F.2d 1190,1195 (9th Cir. 1988). The court concludes that Defendants took a hard look at the Project's environmental impacts on groundwater including depletion and overdraft. Defendants addressed the potential impact of leachate and landfill gas to contaminate the groundwater. Defendants commissioned a detailed report by Dr. R.K. Ham on the likelihood of these problems over the life of the landfill at Eagle Mountain. AR 44487. Defendants also noted that long term performance of composite liners in the presence of municipal solid waste has been documented by a number of researchers and is "expected to exceed the time period in which leachate and gas would be produced in a landfill." AR 43674. Proposed mitigation measures include a vadose zone monitoring system to detect releases before they reach groundwater and a backup groundwater monitoring system. AR 43674-5. Further, the final cover for the landfill provides additional groundwater protection. AR 43676.

The EIS also evaluated the maximum annual groundwater use by the landfill and the townsite, compared to the annual groundwater recharge and concluded that the landfill would not result in overdrafting the groundwater. Defendants simulated water level declines in general areas in the western Chuckwalla Basin where wells are located. AR 43690. The maximum groundwater-level decline after pumping continuously at the maximum demand rate for 100 years was approximately 15 feet in the nearest existing non-Project well and even less

further away from the Project wells. AR 43690. Forty feet must remain in a well for it to be functional. AR 43690. The nearest existing non-Project well is at least 100 feet deep. AR 43690.

(v) Air Quality

Plaintiffs contention that the EIS failed to take a hard look at the project's potential impact on air quality in JTNP is entirely without merit. The issue of air quality is discussed at length in the final EIS. *See* AR 46266-70. Further, an over 300 page appendix dealing exclusively with air quality discusses such topics as "regional haze," "acid deposition," and "visibility" in JTNP. While it is true, as Plaintiffs contend, that "NEPA imposes an affirmative duty on federal agencies to 'ensure the professional integrity, including scientific integrity, of the discussions and analyses in the [EIS]'," *Utahns for Better Transp. v. United States Dep't of Transp.*, 305 F.3d 1152,1181-82 (10th Cir. 2002) (citing 40 C.F.R. § 1502.24), Plaintiffs do not present to this court any reason to cause it to believe that Defendants have failed to do so.

(vi) Bighorn Sheep

Lastly, Plaintiffs contend that Defendants failed to take a hard look at the proposed project's impact on Bighorn sheep. The court agrees.

In the EIS, Defendants discuss the creation of a "buffer zone" mitigation measure. However, the EIS does not specify exactly what such "buffer zone" entails, or even where it is to be located. As such, it is

far too theoretical to constitute a good faith attempt at mitigation. Further, as stated earlier, the Ninth Circuit has held that an EIS must address a project's impacts on wildlife habitat and migration corridors. *See Marble Mountain Audubon Soc'y*, 914 F.2d at 182. Because the use of tortoise-proof fencing may disrupt the sheep's migration patterns, AR 71:51285, Defendants are obligated under NEPA to address such disruption in the EIS, which they did not do. The Court concludes that the BLM has not engaged in a reasonably thorough discussion of the significant aspects of probable environmental consequences of the land exchange and land interest grants as to eutrophication and the Big Horn Sheep.

2. Statement of "Purpose and Need"

Plaintiffs contend that Defendants statement of "purpose and need," for the proposed land exchange and land interest grants as required under 40 C.F.R. § 1502.13, is "unreasonably narrow." Defendants contend that they properly defined the purpose and need of its actions to include the goals of the Project proponent.

The Ninth Circuit affords agencies considerable discretion to define the purpose and need of a project. *Friends of Southeast's Future v. Morrison*. 153 F.3d 1059 (9th Cir. 1998) (citing *City of Angoon v. Hodel*. 803 F.2d 1016 (9th Cir. 1986)). However, agencies do not have unlimited discretion to define the purposes of a project. *Friends of Southeast's Future* at 1066. "An agency cannot define its objectives in unreasonably narrow terms." *City of Carmel-by-the-Sea v. United States Department of Transportation*,

123 F.3d 1142 (9th Cir. 1997). "[A]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." *Friends of Southeast's Future*, 153 F.3d at 1066 (quoting *Citizens Against Burlington, Inc. v. Busey*. 938 F.2d 190 (D.C. Cir. 1991)).

> The stated purposes of the Project at issue in this case are:
>
> [t]o develop a new Class III nonhazardous municipal solid waste landfill to meet the projected long-term demand for environmentally sound landfill capacity in Southern California; provide a long-term income source from the development of a nonhazardous municipal solid waste landfill; find an economically viable use for the existing mining by-products at the Kaiser Eagle Mountain Mine site, including use of existing aggregate and overburden; and provide long-term land use and development goals and guidance for the Townsite.

AR 43293.

The court concludes that the BLM abused its discretion by so narrowly defining the purpose and need of the proposed land exchange that *only* the proposed land exchange and land interest grants

could accomplish the agency's goals. The EIS examines six alternatives to the proposed action: 1) No Action; 2) Reduced Volume of Onsite Disposal; 3) Alternate Road Access; 4) Rail Access Only; 5) Landfill on Kaiser Land Only, and 6) Landfill Development/No Townsite Development.

The "No Action" and "Landfill Development/No Townsite Development" alternatives are clearly inconsistent with the stated Project purposes of developing landfill capacity and providing "long-term land use and development goals and guidance for the Townsite." Further, the alternatives of "Reduced Volume of Onsite Disposal," "Alternate Road Access," and "Rail Access Only" all presuppose the existence of a landfill on the site of the proposed land exchange, and are thus not properly characterized as real alternatives to the land exchange and land interest grants.

Defendants' statement of purpose and need is a self-fulfilling prophecy. *See Friends of Southeast's Future*, 153 F.3d at 1066; *Citizens Against Burlington, Inc.*, 93 F.2d at 196, *supra*; *City of New York v. United States Department of Transportation*, 715 F.2d 732, 743 (2d Cir. 1983) ("[A]n agency will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered.") It contrasts markedly with the statement of purpose and need at issue in *Friends of Southeast's Future*, which the Ninth Circuit found to be "not unreasonable." *Id.* at 1067.

In *Friends*, the Forest Service was considering several alternatives for harvesting timber within a specified area. The statement of purpose and need provided: 1) to implement certain broadly defined "wilderness," "timber," "visual," "fish," and "wildlife" goals; 2) "to help meet market demand for timber in Southeast Alaska"; and 3) "to move toward the desired future condition for the Project Area by harvesting mature stands of suitable timber and replacing them with faster growing, managed stands of second growth timber, capable of long-term timber production...." The Ninth Circuit held that such a statement "permitted the Forest Service to evaluate a *wide range* of action alternatives... (emphasis added)." In contrast, the statement of purpose and need in the instant case *does not* permit the BLM to evaluate a wide range of alternatives. The only action which will satisfy the statement of purpose and need, other than the "Landfill on Kaiser Land Only" option, is the proposed land exchange and land interest grants. Any other action will leave at least one, if not more, objectives unmet. As such, the EIS is a "foreordained formality," and violates NEPA.

The Court concludes that as to eutrophication, Big Horn sheep, purpose and need and reasonable range of alternatives the BLM has not engaged in a reasonably thorough discussion of the environmental consequences of the subject land exchange and land interest grants. The Court, therefore, will grant Plaintiffs' Motions for summary judgment and deny Defendants' Motions for summary judgment on the NEPA claim as to those subjects for environmental impact analysis. As to the other challenged subjects for an environmental impact analysis the Court finds

that Defendants did engage in a reasonably thorough discussion of the environmental consequences of the subject land exchange and land interest grants. The Court will grant Defendants' Motions for summary judgment and deny Plaintiffs' Motions for summary judgment on the NEPA claim as to those subjects for environmental impact analysis.

3. "Reasonable Range" of Alternatives

Plaintiffs contend that Defendants failed to consider certain reasonable alternatives to the proposed land exchange and land interest grants in violation of 40 C.F.R. § 1502.14. Defendants contend that they considered a "wide range of alternatives designed to accomplish the various major purposes of the landfill project."

Under NEPA, the BLM must consider in its EIS "a reasonably full range of alternatives" to the proposed land exchange. 40 C.F.R. § 1502.14. Such alternatives "are the heart of the [EIS]." *Id.*

Because Defendants defined the purpose and need of the proposed land exchange too narrowly, they did not consider a reasonable range of alternatives. The court will therefore remand these actions to the BLM with direction to consider among other things reasonable alternatives to the proposed land exchange and land interest grants which are more environmentally benign and will effectuate the primary purpose and need of generating long-term landfill capacity for Southern California.

IV.

DISPOSITION

ACCORDINGLY, IT IS ORDERED THAT:

(1) Plaintiffs motions for summary judgment in case no. EDCV 99-0454 and EDCV 00-0041 are GRANTED with respect to the FLPMA claim, and the following NEPA issues: 1) eutrophication; 2) Bighorn sheep; 3) statement of "purpose and need"; and 4) analysis of "reasonable range of alternatives." They are DENIED with respect to the following NEPA issues: 1) noise; 2) night lighting; 3) visual impacts; 4) desert tortoises; 5) air quality; and 6) groundwater;

(2) Defendants motions for summary judgment in case no. EDCV 99-0454 and case no. EDCV 00-0041 are GRANTED with respect to the following NEPA issues: 1) noise; 2) night lighting; 3) visual impacts; 4) desert tortoises; 5) air quality; and 6) groundwater. They are DENIED with respect to the FLPMA claim, as well as to the following NEPA issues: 1) eutrophication; 2) Bighorn sheep; 3) statement of "purpose and need"; and 4) analysis of "reasonable range of alternatives;"

(3) The subject land exchange and grant of rights of way and reversionary interests are set aside and Defendants are enjoined from engaging in any action that would change the character and use of the exchanged properties pending the BLM's preparation of an ROD consistent with the Court's rulings in this Order and an EIS which addresses the deficiencies in

the subject Final EIS as noted by the Court in this Order;

(4) These actions are REMANDED to the BLM for proceedings consistent with this order; and

(5) The Court retains jurisdiction to resolve any legal challenges by Plaintiffs to the new ROD and EIS and to vacate or reaffirm the above stated injunction and set aside Order.

DATED: September 20,2005

//s//
ROBERT J. TIMLIN
United States District Judge

APPENDIX C

IBLA Decision

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals

DONNA AND LARRY CHARPIED

NATIONAL PARKS AND CONSERVATION ASSOCIATION

IBLA 99-141, 99-150

Decided September 30, 1999

INDEX CODE:

40 CFR 1508.8(b)

40 CFR 1508.27(b)

43 CFR 4.450.2

43 CFR 1601.0-5(b), (c)

43 CFR 1610.5-3(a)

43 CFR 2200.0-6

43 CFR 2201.3(a)

43 CFR 2201.5(c) (2)

43 CFR 2804.1(b)

50 CFR 17.11(h)

Appeals from decisions of the California State Director, Bureau of Land Management, granting two rights-of-way (CACA-25594 and CACA-31926) and denying protests against a proposed land exchange (CACA-30070).

Affirmed.

1. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

Under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), the adequacy of an EIS must be judged by whether it constituted a "detailed statement" that took a "hard look" at the potential significant environmental consequences of the proposed action, and reasonable alternatives thereto, considering all relevant matters of environmental concern. In general, an EIS must fulfill the primary mission of that section, which is to ensure that BLM, in exercising the substantive discretion afforded it to approve or disapprove an action, is fully informed regarding the environmental consequences of such action. In deciding whether an EIS promotes informed decisionmaking, it is well settled that a "rule of reason" will be employed. An EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decisionmaker to consider fully the environmental factors involved and to make a

reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives. The question is whether the EIS contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed action and alternatives thereto. Where BLM has complied with the procedural requirements of section 102(2)(C) of NEPA by taking a hard look at all of the likely significant environmental impacts of a proposed action, it will be deemed to have complied with the statute, regardless of whether a different substantive decision would have been reached by this Board or other decisionmaker.

2. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges

BLM may dispose of lands by exchange under section 206(a) of FLPMA, 43 U.S.C. § 1716(a) (1994), where it determines that the public interest will be well served by making that exchange. In deciding what is in the public interest, BLM is required to fully consider the opportunity to achieve better management of Federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives, including protection of fish and wildlife habitats, consolidation of lands and/or interests in lands for more logical and efficient management and development; expansion of communities; promotion of multiple-use values; and fulfillment of public needs. In making this determination, BLM must find that the intended use of the conveyed Federal lands will not, in the

determination of the authorized officer, significantly conflict with established management objectives on adjacent Federal lands. BLM has discretion to decide how to balance all of the statutory factors when making a public interest determination. A decision approving a land exchange will be affirmed where the record shows that BLM met these requirements.

3. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges

Section 206(b) of FLPMA, 43 U.S.C. § 1716(b) (1994), requires that the values of the public and private lands exchanged be equal or equalized by the payment (absent waiver in appropriate circumstances) of not more than 25 percent of the total value of the land transferred out of Federal ownership. A party challenging an appraisal determining fair market value is generally required to either show error in the methodology used in determining fair market value or, alternatively, submit its own appraisal establishing fair market value, failing in which the BLM appraisal is properly upheld.

4. Federal Land Policy and Management Act of 1976: Rights-of-Way— Rights-of-Way: Generally--Rights-of-Way: Federal Land Policy and Management Act of 1976

Section 501(a)(6) of FLPMA, 43 U.S.C. § 1761(a)(6) (1994), authorizes the Department to grant rights-of-way over, upon, under, or through public lands for roads, trails, or other means of transportation. Approval of rights-of-way is a matter

of discretion. The Board will ordinarily affirm a BLM decision approving or rejecting a right-of-way application where the record demonstrates that the decision is based on a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason is shown to disturb BLM's decision. An appellant, as the party challenging BLM's decision, has the burden of showing adequate reason for appeal and of supporting the allegations with evidence demonstrating error. Conclusory claims of error or differences of opinion, standing alone, do not suffice.

APPEARANCES: Donna and Larry Charpied, Desert Center California, pro sese; Deborah A. Sivas, Esq., and Alicia Thesing, Esq., Stanford, California, for National Parks and Conservation Association; Perry M. Rosen, Esq., Thomas D. Roth, Esq., and William G. Malley, Esq., Washington, D.C., for Respondents Kaiser Eagle Mountain, Inc., and Mine Reclamation Corporation; David Nawi, Esq., John R. Payne, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Donna and Larry Charpied (the Charpieds) and the National Parks and Conservation Association (NPCA) have appealed from two separate December 9, 1998, decisions of the California State Director, Bureau of Land Management (BLM), granting two rights-of-way (CACA-25594 and CACA-31926) and denying their protests against a proposed land exchange (CACA-30070). By order dated March 5,

1999, we consolidated the appeals (the Charpieds' (IBLA 99-144) and NPCA's (IBLA 99-150)), granted expedited consideration, stayed the approval of the land exchange pending our review of the appeals, denied a stay of the granting of the two rights-of-way, and granted the petition of Kaiser Eagle Mountain, Inc. (KEM), and Mine Reclamation Corporation (MRC), to intervene as Respondents.

The procedural history of this matter is long and the case record voluminous. It is sufficient to note that BLM has been processing a land exchange proposal submitted in 1989 by KEM to facilitate construction and operation of the Eagle Mountain Landfill and Recycling Center Project (the Project), an enormous solid waste municipal landfill to be constructed on a privately-owned unreclaimed open pit iron ore minesite located in eastern Riverside County, California, approximately 1 1/2 miles from the Joshua Tree National Park (JTNP), at its nearest point.[1] The Project also includes the planned

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[1] As stated by the California Court of Appeal,

"[t]he Eagle Mountain open pit iron ore mine was the location of extensive mining operations by Kaiser Steel Corporation [KSC] from 1948 to 1983. The mine is located approximately 200 miles east of Los Angeles, 50 miles west of the Arizona border, 10 miles north of Desert Center, and approximately one and one half miles south of [JTNP]. The mining operation resulted in the excavation of three large open pits; each[ ] one to two miles long. The mining operations ceased in 1983, and Kaiser has leased the mine site to [MRC], the prospective operator of the landfill.

"[MRC] plans to utilize the open pits left from the mining operation to create what all parties have agreed is the largest

landfill in the country. The landfill footprint will encompass approximately 2,262 acres with a larger project area of 4,654 acres. The landfill will have the capacity to accept up to 20,000 tons per day of wastes for a minimum of 115 years." *National Parks & Conservation Assn. v. County of Riverside*, 42 Cal.App.4th 1505, 1509-10 (1996) (NPCA I) (quoting Trial Court).

In its more recent decision, the Court of Appeal added:

"The landfill will fill in areas left by the huge pits of the mining operations (farthest from the Park, to begin with) and will also fill in nearby canyons and hillsides which already contain the waste material from mining operations. A six-inch layer of dirt and mine debris will be placed daily upon the fill material. In addition to the landfill, the project will include the operation of a 52-mile railroad line and the upgrading of a county road, both for purposes of bringing in the trash for processing. Also, an existing campsite in the area, an outgrowth of a previous company town run by the mining company, will be expanded to serve the workers at the landfill. Currently, the campsite has a few hundred residents and a privately run prison facility operates there, housing 500 prisoners.

"The site of the landfill project is about one and one-half miles from the nearest Park boundary, as established in 1994 when the Park was converted from a national monument to a larger national park through the federal California Desert Protection Act, which expanded the Park boundaries. (16 U.S.C. § 410aaa-21 *et seq.*) The areas between the site and this portion of the Park boundary include infrastructure such as an aqueduct, a pump station, utility and communication lines, roads, and another employee townsite." *National Parks & Conservation Assn. v. County of Riverside*, No. D031056 (Slip Opinion at 5-6, May 7, 1999) (NPCA II).

KSC operated an open pit iron ore mine at this site (on patented mining claims) from 1947 to 1982, when large-scale mining operations ceased. Shipping of iron ore and other activity continued for some time thereafter, but KSC declared bankruptcy in 1987, emerging from bankruptcy in 1988 as Kaiser Steel Resources (KSR). Recognizing the site's potential

renovation and repopulation of the adjacent area known commonly as the Kaiser "campsite" to provide housing for Project workers.

The present appeals arise because, on September 25, 1997, BLM's California Desert District Office (CDDO) Manager issued a Record of Decision (ROD) announcing that he "approved the land exchange" (CACA-30070) between KEM and the United States (ROD at 1), and that a final decision to issue two rights-of-way to KEM would be withheld "pending receipt and review of any protest to the land exchange."[2] BLM received protests against that ROD, including those by the Charpieds and NPCA. On December 9, 1998, the California State Director, BLM, issued decisions denying those protests. The State Director also announced that BLM would issue

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as a landfill, KSR leased the Eagle Mountain site to MRC to develop the Project. (KEM/MRC Answer at 6-7.) MRC and KEM jointly pursued applications for the project.

Our review of the record shows that the landfill is described as a "Class III, non-hazardous, solid waste landfill" comprising about 2,164 acres. In addition to the landfill, the project area would consist of about 2,490 acres for buffer and ancillary features. (Draft Environmental Impact Statement/Environmental Impact Report (EIS/EIR) at ES-2.)

[2] BLM's announcement in the ROD that it had "approved the land exchange," viewed by itself, suggested that BLM was issuing an immediately appealable decision to approve the exchange. However, from BLM's statement that it expected to receive and adjudicate protests against the action, it is apparent that BLM was announcing that it was merely proposing to approve the exchange at that time. No protest would have been available unless the action was "proposed to be taken." *See* 43 C.F.R. § 4.450-2.

the two rights-of-way pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. § 1761 (1994), and 43 C.F.R. § 2804.1(b). The Charpieds and NPCA have appealed from the denial of their protests and also challenge the decision to grant the rights-of-way.

The State Director's decision cleared the way for the exchange of approximately 3,481 acres of public land and the reversionary interest held by the United States in the surface estate of approximately 460 acres of private land (selected public lands),[3] to KEM in return for 10 parcels owned by KEM totaling approximately 2,846 acres (offered private lands) plus a cash payment of $20,100, representing the cash value difference in valuations. (ROD at 2, 19.) [4]

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[3] *See* ROD Ex. A-1.

In 1955, the United States issued Patent Los Angeles 0121702 conveying the surface estate in 465.85 acres to KSC for campsite and millsite purposes, pursuant to section 3 of the Act of July 8, 1952, Priv.L. No. 790, 66 Stat. A130. The patent provided that title to the surface estate would revert to the United States if it was not used "for a continuous period of seven years as a camp site or mill site or for other incidental purposes in connection with the mining operations of [KSC] or its successors in interest." This Federal "reversionary interest" was expressly included in the selected public lands. (ROD at Ex. A-1 p. 3.)

[4] *See* ROD at 9-10; Ex. A-2. The reference elsewhere in the ROD to seven parcels owned by Kaiser (ROD at 19) relates to the Appraisal Report, which grouped the 10 parcels of offered private lands into 7 groups by combining some parcels of contiguous lands for appraisal purposes. (Appraisal Report, Vol. III at 2, 43-70.)

The parcels of selected public lands are scattered around the fringes of the private land where the iron ore mine is situated. (Appraisal Report Vol. II at 33; ROD Ex. B; Draft EIS/EIR Technical Appendices[5] Vol. II, p. A-3.) Review of the plans submitted by KEM shows that use of these lands is integral to the planned operation of the Project. None of the selected public lands is contiguous to lands within JTNP. *See* ROD Ex. B.

The 10 parcels of offered private lands are scattered along the route of an existing rail line running to the landfill site from the Southern Pacific Railroad at Ferrum Junction, near the Salton Sea. *Id.* Their acquisition would generally consolidate public landholdings administered by BLM. Three of the parcels of offered private lands ("Group C") are situated within the Chuckwalla Bench Area of Critical Environmental Concern (ACEC) (ROD at 10);[6] three ("Group A") are situated in the vicinity of

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[5] The EIS/EIR that was approved in January 1997 adopted most of the discussion of environmental consequences set out in the July 1996 Draft EIS/EIR, making only what are described as "minor changes in the description of the environmental consequences, resulting from public and agency comments." (Final EIS/EIR at 4-1.) As a result, much of the substance of the EIS/EIR appears in the Draft EIS/EIR.

[6] The Chuckwalla Bench ACEC is situated 13 miles south of the Project site and provides habitat for the desert tortoise (*Gopherus agassizii*), a Federally-listed threatened species under the Endangered Species Act of 1973 (ESA), *as amended*, 16 U.S.C. § § 1531 through 1544 (1994). See 50 C.F.R. § 17.11(h).

the Salt Creek (Dos Palmas) ACEC (ROD at 9);[7]

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[7] The Salt Creek (Dos Palmas) ACEC is situated 30 miles southwest of the Project and encompasses a tributary of the Salt Creek, which provides habitat for the desert pupfish (*Cyprinodon macularius*), a Federally-listed endangered species.

BLM noted in the ROD that the "entire ACEC area of about 14,000 acres includes both Federal and private lands and is popularly referred to as Salt Creek (Dos Palmas) ACEC, even though the ACEC only includes the Federal lands." (ROD at 9.) The ACEC is referred to as the "Dos Palmas/Salt Creek ACEC" elsewhere in the ROD. (ROD at Ex. B.)

The Charpieds make much of inconsistencies in the nomenclature for the Salt Creek (Dos Palmas ACEC), asserting that "this ACEC is known as the Salt Creek Pupfish/Rail ACEC, and is only popularly known as Dos Palmas in the deep recesses of [BLM's] mind, ever since the first [notice of realty action (NORA)] was issued in 1992." The Charpieds fail to show how the difference in nomenclature has any significance.

The Charpieds assert that BLM has somehow changed the ACEC boundaries without notifying the public and that BLM claims "this ACEC to be more than legally designated *** because they cannot justify acquiring all of those Kaiser railroad lands which are not in or abutting that critical habitat known as Salt Creek." (Charpieds' Statement of Reasons (SOR) at 18. This misconception apparently arises from the fact that BLM referred to "the entire ACEC area" as having 14,000 acres instead of 4,253 acres as calculated by the Charpieds. That discrepancy is fully explained by BLM. (BLM Answer at 12-13.) The boundary of the ACEC encloses approximately 14,000 acres, referred to by BLM imprecisely as the "entire ACEC area," which included *both* Federal lands *and* non-Federal lands. However, the ACEC actually consists only of Federal lands managed by BLM within the boundaries of the ACEC, which total much less.

To the extent that the Charpieds argue that BLM surreptitiously enlarged the ACEC to justify the land exchange, they are simply mistaken. The boundary of the ACEC (originally denominated "ACEC 60") does not appear to have

three ("Group B") are situated near the southern boundary of the Orocopia Mountains Wilderness Area; and one ("Group D") is situated in an area designated by the U.S. Fish and Wildlife Service (FWS) as critical habitat for the desert tortoise that is "adjacent to a large block of BLM managed lands to the north," although it "is not inside any specially designated management area." (ROD at 10.) The offered private lands conveyed to BLM by KEM will become part of the California Desert Conservation Area (CDCA) pursuant to 43 C.F.R. § 2200.0-6(f). (ROD at 2.) The offered private lands are and will continue to be crossed by a rail line connecting the Project with the Los Angeles metropolitan area.

Right-of-way grant CACA-25594 (the "rail line right-of-way"), issued to KEM, authorizes use of a 28.6-mile corridor through scattered Federal lands along the existing 52-mile Eagle Mountain rail line between Eagle Mountain and Ferrum Junction. The rail line right-of-way would also allow the construction of a new rail spur from the terminus of the existing rail line to the landfill site. (Draft EIS/EIR at 1-18, Fig. 2-12.) It also authorizes a 3-mile extension of the Eagle Mountain Road from the Metropolitan Water District of Southern California's (MWD's) pumping station to the landfill site. (ROD at

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changed since 1984. (*See* BLM Answer, Ex. G-6.) Determining the acreage of the ACEC itself is apparently simply a matter of identifying Federal lands within the ACEC boundary.

BLM's statement that three of the parcels of offered private lands "are located in the vicinity of the Salt Creek (Dos Palmas)" ACEC is entirely accurate.

3.) The rail line right-of-way crosses each parcel group of offered private lands. (ROD at Ex. B.) Right-of-way grant CACA-31936 (the "roadway right-of-way"), issued jointly to KEM and MWD, authorizes the use of 6.75 miles of existing roadway (the Eagle Mountain Road) from north of Interstate 10 to the site. (Draft EIS/EIR Fig. 2-4.) Both rights-of-way are intended to allow haulage of waste materials across public land to the Project.[8]

It is conceded by all parties that, without approval of the exchange and right-of-way grants, the Project will not go forward. BLM served as the "lead agency" in preparation of an EIS, as required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1994), as a prerequisite to undertaking any "major Federal action having a significant impact on the quality of the human environment."[9] *See, e.g., Foundation for North American Wild Sheep v. United States Department of Agriculture*, 681 F.2d 1172, 1178 (9th Cir.1982). The County of Riverside (the County) served as the lead State agency to comply with the California Environmental Quality Act (CEQA), California Federal Resources Code § 21000. Together, starting

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[8] The rail line right-of-way replaces an existing right-of-way (LA-0121701) granted to KSC pursuant to Priv.L. No. 790, *supra*. The roadway right-of-way replaces an existing R.S. 2477 right-of-way.

[9] The National Park Service (NPS) and the Biological Resources Division of the U.S. Geological Survey (formerly the National Biological Service), both agencies of the Department of the Interior, served as "cooperating agencies" under NEPA.

in 1995, these agencies prepared the current joint Federal EIS/California State EIR (EIS/EIR), publishing a draft EIS/EIR in July 1996.[10] Following receipt and consideration of extensive public comment, BLM and the County published the final EIS/EIR in January 1997. This EIS/EIR properly considered the environmental effects of the entire project and alternatives, not just impacts on the affected Federal lands. *See* 40 C.F.R. § 1508.8(b) (requiring consideration of "indirect effects") and 40 C.F.R. § 1508.27(b)(7) (requiring consideration of "cumulative impacts").[11] In appealing the State Director's decisions, the Charpieds and NPCA have challenged the adequacy of the EIS/EIR as a basis for his action.

It is well established that, under section 102(2)(C) of NEPA, the adequacy of an EIS must be judged by whether it constituted a "detailed statement" that took a "hard look" at the potential significant environmental consequences of the proposed action, and reasonable alternatives thereto,

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[10] This was the second EIS/EIR that was prepared for this project. The first was completed in July 1992, but was recalled by BLM for further consideration of relevant environmental issues, including impacts (air quality, wildlife, and other resources) of the Project on JTNP and on the desert tortoise. BLM explains that it prepared the new document to comply with a State Court order. (Draft EIS/EIR at ES-5.)

[11] BLM reviewed not only the BLM/Kaiser land exchange and FLPMA right-of-way authorizations, but also the utilization and eventual reclamation of the iron ore mine for use as a municipal solid waste landfill and the renovation of the adjacent Eagle Mountain Campsite.

considering all relevant matters of environmental concern. 42 U.S.C. § 4332(2)(C) (1994); *Colorado Environmental Coalition*, 142 IBLA 49, 52 (1997), and cases cited. In general, an EIS must fulfill the primary mission of section 102(2)(C) of NEPA, which is to ensure that BLM, in exercising the substantive discretion afforded it to approve or disapprove an action, is fully informed regarding the environmental consequences of such action. See 40 C.F.R. § § 1500.1(b) and (c); *Natural Resources Defense Council, Inc. v. Hodel*, 819 F.2d 927, 929 (9th Cir.1987). In deciding whether an EIS promotes informed decisionmaking, it is well settled that a "rule of reason" will be employed. As the Court stated in *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir.1977), cert. denied, 434 U.S. 1064 (1978),

> an EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decisionmaker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

The question is whether the EIS contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed action and alternatives thereto. *State*

of California v. Block, 690 F.2d 753, 761 (9th Cir.1982) (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir.1974)).

Where BLM has complied with the procedural requirements of section 102(2)(C) of NEPA by taking a hard look at all of the likely significant environmental impacts of a proposed action, it will be deemed to have complied with the statute, regardless of whether a different substantive decision would have been reached by this Board or other decisionmaker. *See Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980), and cases cited. As we said in *Oregon Natural Resources Council*, 116 IBLA 355, 361 n. 6 (1990):

[Section 102(2)(C) of NEPA] does not direct that BLM take any particular action in a given set of circumstances and, specifically, does not prohibit action where environmental degradation will inevitably result. Rather, it merely mandates that whatever action BLM decides upon be initiated only after a full consideration of the environmental impact of such action.

In order to overcome BLM's decision to proceed with this land exchange and issue these rights-of-way, appellants must carry the burden to demonstrate by a preponderance of the evidence, with objective proof, that BLM failed to consider, or to adequately consider, a substantial environmental question of material significance to the proposed action or otherwise failed to abide by section 102(2)(C) of NEPA. *See Colorado Environmental Council*, 142 IBLA at 52.

The Charpieds complain that the EIS/EIR incorrectly determined that the impact of the project on JTNP will be "insignificant." *See* Draft EIS/EIR at 4.5-16. The question of whether individual adverse impacts have been reduced to insignificance is not presented in relation to the adequacy of the EIS/EIR.[12] If BLM has met its obligation to take a "hard look" at the environmental effects of the Project (including, but not limited to, effects on JTNP), it need not show that every impact has been reduced to insignificance.[13] Instead, a Federal agency is required to discuss mitigation "in sufficient detail to ensure that environmental consequences have been fairly evaluated"; it is not under any "substantive requirement that a complete mitigation plan be actually formulated and adopted." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352

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[12] As discussed below, the question of whether there would be significant impacts is relevant to whether "the public interest will be well served by making" the land exchange under 43 U.S.C. § 1716(a) (1994).

[13] The joint EIS/EIR contains findings of significance or insignificance for each particular impact examined because California law requires it in an EIR. Cal. Public Resources Code § 21100; Cal.Code Regs. § 15126. CEQA also mandates that all "significant" impacts be mitigated to insignificance if feasible. *See* Cal.Code Regs. § § 15091, 15092, and 15093.

The County, by approving the project based on the EIS/EIR, implicitly concluded that this was the case. The California Court of Appeal has subsequently ruled that the County's findings were supported by substantial evidence in the EIS/EIR and must accordingly be affirmed. *See NPCA II* at 4-5. The Supreme Court of California denied NPCA's Petition for Review of *NPCA II* on July 21, 1999.

(1989); *see National Wildlife Federation*, 145 IBLA 348, (1998). Therefore, even if we could agree that the finding in the EIS/EIR that the effects on JTNP (or other environmental impacts) could be reduced to insignificance is erroneous, the EIS would not be rendered invalid under applicable precedent.

Nevertheless, we can agree that the EIS/EIR could not be considered adequate under applicable precedent unless it contains a full analysis of the effects of the Project on JTNP, which is plainly a "relevant matter of environmental concern." Applying that precedent, we conclude that there is no doubt that BLM, in concert with NPS (the agency delegated the responsibility of managing JTNP), has taken a hard look at environmental effects on JTNP. Review of the EIS/EIR reveals that BLM carefully considered the effects of the Project on JTNP.[14] Further, the case record discloses that the EIS/EIR was only the end product of an extensive review by BLM and FWS concerning present and long-term effects of the Project on JTNP. Respondents recite the following history:

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[14] For example, section 4.5.3.1 of the Draft EIS/EIR discusses visual, night lighting, and noise impacts on JTNP and describes mitigation measures; section 4.10.2, more fully discusses visual impacts on JTNP; section 4.1.2.1 finds that quality of ground-water in JTNP will not be degraded; section 4.10.3 addresses the effects of windblown debris and dust on JTNP and mitigation measures; section 4.2.3.2 considers the effect of landfill gas condensate on JTNP; section 4.11.3.1 addresses "skyglow" impacts on wilderness portions of JTNP, and section 4.10.4 of the Final EIS/EIR establishes mitigation measures. *See also* Draft EIS/EIR, Table 1-1 (citing 20 sections discussing impacts on JTNP).

When the decision was made [in 1995] to prepare the new EIS/EIR, BLM invited the NPS to participate as a "cooperating agency" in the preparation of the new document--a role that would recognize NPS' special expertise in evaluating impacts on the newly designated JTNP.

At the scoping stage, the NPS submitted a 12-page letter outlining issues that it wanted to see addressed in the EIS/EIR. With the assistance of the consultant preparing the EIS/EIR, BLM reviewed these issues one by one, held a series of meetings with the NPS staff, and incorporated many of the NPS's recommendations into the Draft EIS/EIR. Before the Draft EIS/EIR was issued, BLM provided an "administrative draft" of the document to NPS for review, and the NPS provided more than 150 pages of comments. Again, BLM responded point by point to NPS's comments in a 34-page response. BLM accepted many of the NPS's recommendations and provided detailed explanations for those it declined to accept. When the Draft EIS/EIR itself was issued, the NPS submitted a third round of comments, even more detailed than the last. Again, BLM painstakingly reviewed the NPS's comments and addressed each of them.

As the new EIS/EIR was being prepared, the NPS again raised the issue of the project's potential *unknown and unpredictable*

> impacts, as it had in 1992. To address this concern, MRC revived an idea that the NPS itself had proposed during preparation of the first EIS/EIR--namely, entering into an agreement that would establish a long-term mitigation and monitoring program. Over the next 18 months, MRC and the NPS engaged in extensive discussions to develop a detailed, enforceable agreement. In the end, MRC and NPS entered into a binding agreement that gives NPS precisely what they had requested as early as 1992--a comprehensive, long-term monitoring and mitigation program, which runs for the life of the project and is specifically tailored to detect and address any unforseen impacts on JTNP. While the NPS made it clear that it would prefer to avoid any industrial-type activity at the mine site, the agency agreed that if the landfill project were to go forward, the agreement with MRC provided the appropriate safeguards for addressing NPS's concerns about any gradual, long-term impacts (which cannot be accurately predicted).

(KEM/MRC Answer at 13-15 (references and footnote omitted).) The case record fully supports the accuracy of this statement.

It is also important that NPS agreed with all of the findings in the EIS/EIR concerning the significance of effects. *See* NPS Agreement; Letter

dated July 11, 1997, from John J. Reynolds.[15] It is clear that BLM did not substitute the NPS Agreement for the analysis in the EIS/EIR. Rather, BLM's review of effects on JTNP was extensive and included NPS, the agency responsible for maintaining JTNP. Acquiring NPS' opinions on the subject of mitigating adverse impacts on JTNP was plainly an essential part of BLM's efforts to take the required "hard look."

The Charpieds also complain that it has not been established that impacts on the desert tortoise have been reduced to a level of insignificance. (Charpieds' SOR at 34.) Impacts to the desert tortoise were discussed at sec. 4.7.3.2 of the Draft EIS/EIR where it was noted that tortoises could be killed, their reproduction reduced, and their habitat lost in several ways attributable to operation of the rail line

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[15] In that letter, John J. Reynolds, Regional Director for the Pacific West Regional Office, NPS, stated:

> "There are, and will continue to be unresolved issues concerning this project, if approved. That would be true with the siting of any industrial activity in this or any location. *** Because of these potential unknown and unpredictable impacts, the NPS entered into the Agreement with MRC, to provide [[[JTNP] with the means to identify and resolve such impacts if they occur. In the Agreement both parties acknowledge the accuracy of the [EIS/EIR] analysis regarding known impacts. The Agreement further states that the NPS and Kaiser/MRC agree that 'the mitigation measures proposed, if implemented, reduce the known effects of the Project on the Park (except for the potential effects on the wilderness experience) below the levels of significance as required by CEQA.' "

and the landfill. (Draft EIS/EIR at 4.7-5-8.) The Draft EIS/EIR concluded that

> [d]irect loss of individual adult or juvenile animals in excess of one animal per year, as specified in the Biological Opinion (USFWS, 1992), reduction in reproductive success in desert tortoise populations, loss of habitat for the tortoise in the immediate vicinity of the Project site, and increase in juvenile tortoise mortality from increased predator populations in JTNP could occur as a result of one or more of the potential effects listed above. This loss would be considered a significant adverse impact.

(Draft EIS/EIR at 4.7-8.) The Draft EIS/EIR proceeded to set out in detail mitigation measures for the Project that would avoid or minimize impacts to tortoises during construction and operation of the Project. Thirty-nine specific protective mitigation measures were set forth. (Draft EIS/EIR at 4.7-20-28.) The Draft EIS/EIR contains an extensive analysis of the these measures' efficacy in protecting tortoises in some 263 other projects that had been authorized in desert tortoise habitats by FWS. (Draft EIS/EIR at 4.7-31 to 4.7-36, Appdx. G at 3-32 to 3-39.) Finding that the FWS-mandated mitigation measures had been effective in reducing tortoise mortality to acceptable levels (Draft EIS/EIR, Appdx. G at 3-39,) the Draft EIS/EIR concluded, "Because implementation of the recommended terms and conditions for this and other projects will reduce the potential numbers of tortoises killed to less than that authorized, the potential impacts would be reduced to

below the level of significance." (Draft EIS/EIR at 4.7-36.)

The Final EIS/EIR also imposed additional protective measures by increasing the area of desert tortoise habitat that BLM will receive from KEM from 375 to 400 acres as mitigation for an additional 10 acres of desert tortoise habitat that would be destroyed by the Project. Further, BLM expanded control measures for ravens, which are known to prey on desert tortoises, to cover the Campsite area. (Final EIS/EIR at 6-20.)

Once again, BLM is not required by applicable law to show that impacts on the desert tortoise would be insignificant. Those findings have no bearing on the adequacy of the EIS/EIR under Departmental law. Nevertheless, we must consider whether effects on the desert tortoise were fully addressed in the EIS/EIR, because it could not properly be considered adequate without such analysis. The record amply demonstrates that BLM took the requisite "hard look" at this issue. Section 7 of the ESA, 16 U.S.C. § 1536 (1994), requires that BLM consult with FWS to evaluate the landfill project's potential impacts on threatened and endangered species, including the threatened desert tortoise and endangered desert pupfish. Following initiation of consultation with BLM, FWS issued Biological Opinion 1-6-92-F-39, dated September 10, 1992, addressing the effects of the proposal on the desert tortoise and imposing site-specific protective limitations on MRC's operation of the rail line and landfill, including 28 mitigation measures that would "alleviate impacts to desert tortoise and desert pupfish."

FWS reaffirmed the validity of the 1992 Biological Opinion in September 1993, following a Departmental proposed designation of critical habitat for the desert tortoise, and again in September 1996, following review of the amended Draft EIS/EIR. BLM expressly adopted the mitigation measures specified in the FWS Biological Opinion, among others. (ROD Ex. C, 17-21.)

The Charpieds also challenge the adequacy of the environmental review of effects of the Project on groundwater, noise impacts on JTNP, noise impacts on animals (Charpieds' SOR at 25), impact on JTNP of "skyglow" from the Project (Charpieds' SOR at 24-26) and from repopulating the campsite (Charpieds' SOR at 26), impacts on visual resources (Charpieds' SOR at 27-28), and the impacts of possible "eutrophication." (Charpieds' SOR at 29-30.)[16] As

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[16] Eutrophication" is a process, associated with aging aquatic ecosystems such as lakes, whereby concentrations of phosphorus, nitrogen, and other plant nutrients increase, altering the ecosystem by algae blooms or microscopic organisms. "Cultural eutrophication" occurs when the aging process is sped up by the activities of humankind by allowing excess nutrients in such forms as sewage, detergents, and fertilizers to enter the ecosystem. *Encyclopedia Britannica*, Micropaedia Vol. III at 1007 (1979).

In the present context, NPS used the term "eutrophication" to refer to the addition of nutrients (in garbage and trash) to the desert ecosystem, raising the possibility that the ecosystem would be upset by the proliferation of animal life such as insects and rats. NPS requested that this possibility be examined in the EIS/EIR process. *NPCA II* at 29-30.

before, the issue of what standards were used in the EIS/EIR to determine whether there were "significant" impacts from these effects (Charpieds' SOR at 22, 24-28) is not presented in the context of our review of the adequacy of the EIS/EIR. We must instead review each issue to determine whether the effects cited by the Charpieds are "relevant matters of environmental concern" or constitute "probable environmental consequences," such that BLM was required to present a "reasonably thorough discussion" of them as part of its requisite "hard look." The record shows that the EIS/EIR satisfies BLM's obligation to take a "hard look" at such impacts.

Noise impacts on animals (including impacts on sensitive species including the desert tortoise) were not only analyzed (Draft EIS/EIR at Secs. 4.7 and 4.13), but mitigation measures were developed to reduce the Project's impact on those species. *See, e.g.*, Draft EIS/EIR at 4.7-30. The analysis of noise impacts is not rendered inadequate because it takes notice of the fact that the campsite, which is closer to the landfill project, would be exposed to greater noise impacts than JTNP. (Draft EIS/EIR Fig. 4.13-1 at 4.13-5.) Effects on groundwater quality and use were also extensively considered (Draft EIS/EIR at Sec. 4.1), including a Technical Memorandum on the subject. (Draft EIS/EIR, Appdx. C-1.)

The Charpieds assert that BLM failed to adequately assess "impact of the dump adding a large volume of nutrients into an environment which has been nutrient scarce for thousands of years." (Charpieds' SOR at 29-30.)

We find nothing improper in using "key observation points" (KOP's) to assess impacts on visual resources. The BLM Manual Handbook provides that an individual completes a Visual Resource Management contrast rating "from key observation point(s) using Bureau Form 8400-4--Visual Contrast Rating Worksheet." (BLM Manual Handbook 8431-1, at 2.) The four KOP's within JTNP were selected in consultation with NPS. (Draft EIS/EIR at 4.10-3 to 4.10-4; Letter from Tom Peters, CH2M Hill, to Ernest Quintana, JTNP, dated Aug. 15, 1995.) Four additional KOP's were selected outside JTNP. We do not find BLM's assessment of impacts on visual resources (Draft EIS/EIR at Sec. 4.10.2) inadequate. The EIS/EIR also analyzed the visibility of "plumes" that would be emitted from landfill gas flares, based on the Environmental Protection Agency's (EPA's) technical guidance for evaluating the visibility of plumes. (Final EIS/EIR, Response to Comment 1-87; Draft EIS/EIR Sec. 4.4.1.)

The EIS/EIR addressed "eutrophication" and roadkill. (Draft EIS/EIR at Sec. 4.7.4, ROD at 15; Final EIS/EIR at 7-22 to 7-24; Response to Comments 1-123 and 1-153.) The Charpieds fail to specify how this assessment is deficient and thus fail to meet their burden of showing error in BLM's review. Effects of night lighting were addressed. (Final EIS/EIR Sec. 6.6.)

To the extent that appellants fault BLM for not considering the possibility that mining of the site will resume at some point in the future, compounding

environmental questions, this issue goes beyond presently foreseeable effects. BLM's approval of the Project is subject to ongoing monitoring to determine whether additional adverse impacts to the ecosystem eventuate.

NEPA is primarily a procedural statute designed "to insure a fully informed and well-considered decision." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978). That is, although NEPA requires an agency to prepare an EIS where significant impacts are identified (as BLM did here), nothing in NEPA restrains an agency from proceeding with an action that will have significant impacts where it decides that other values outweigh the environmental costs. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989); *Paul Herman*, 146 IBLA 80, 102 (1998). The purpose of preparing the EIS is to inform the agency of possible adverse environmental effects in hopes that the agency can mitigate them. This expectation was well rewarded in this case. As discussed herein, BLM did not disregard the adverse effects identified in its EIS/EIR, but proceeded to carefully consider them (as well as six other alternatives (ROD at 3)) and develop mitigating measures[17] to reduce or eliminate them, in

[17] MRC is also required to implement a comprehensive, detailed mitigation plan, including the establishment of an Environmental Mitigation Trust, the proceeds of which are to be used to purchase habitat for protection from development. *See* Draft EIS/EIR at 1-5 to 1-6. Further, the Project is replete with monitoring measures to ensure that any unforeseen adverse environmental impacts are timely identified.

consultation with Departmental agencies responsible for the subjects presented. We find no basis to disturb its decision.

Turning to the question of whether the land exchange satisfied the requirements of FLPMA, it is appropriate to set out BLM's findings on this question. The CDDO Manager ruled as follows in the ROD concerning the exchange:

> Based on the environmental analysis of the proposed action and alternatives, I have determined that the land exchange *** as conditioned by the adoption of mitigation and monitoring provision[s] *** will not cause unnecessary or undue degradation to Federal lands and resources and [is] in the public interest. Further, I have determined that the conveyance of the Federal lands will not significantly conflict with established management objectives on adjacent Federal lands.

(ROD at 1.) The District Manager added:

> In accordance with Section 206(a) of FLPMA and [43 C.F.R. § 2200.0-6 of the exchange regulations], I have given full consideration to better Federal land management and the needs of State and local people and their economies. It is my determination that the resource values and Federal objectives on the BLM lands are less than the resource values and Federal objectives gained by acquisition of the non-

> Federal lands and, therefore, this land exchange is in the public interest, and does not significantly conflict with established management objectives on adjacent Federal lands.

(ROD at 3.) The District Manager stated as follows concerning "management considerations," many directly involving the land exchange:

> Based upon a careful examination of the EIS/EIR, Federal comment, and after consultation with the NPS/JTNP, Biological Resources Division, U.S. Geological Survey, the County of Riverside, and other appropriate Federal, State agencies, and local government agencies, I have concluded that the proposed action is consistent with BLM management goals and complies with FLPMA. Development of a landfill at a previously disturbed site and adoption of mitigation measures ensures that all reasonable means to avoid or reduce environmental harm have been incorporated into the Project. It is my determination that the acquisition of non-Federal land exceeds the value of Federal lands and interest to be conveyed. I also find that the use of the conveyed lands subject to mitigation and monitoring described in the EIS/EIR will not significantly conflict with established management objectives on adjacent Federal lands and nearby Federal lands.

(ROD at 8.) The District Manager went on to list and

discuss 18 separate factors that he considered in arriving at that decision. He concluded, *inter alia*, that both the land exchange and rights-of-way conformed with the CDCA Plan of 1980, *as amended* (ROD at 8); that the land exchange presented an opportunity for BLM to achieve better management of Federal lands by allowing it to consolidate Federal ownership of habitat for listed species (*Id.* at 8-10);[18]

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[18] The benefit to protection of threatened and endangered species of plants and animals is one of the most significant public benefits of the exchange. BLM elaborated on these benefits. As to Group A, it stated:

"One of the management objectives in the Salt Creek (Dos Palmas) area is to acquire private lands for the management of various palm oases and seeps that provide habitat for the desert pupfish and Yuma clapper rail, both Federally listed endangered species. Over 3,200 acres have been acquired or are in the process of being acquired by BLM. All three of Kaiser's parcels will contribute to consolidating Federal lands, thus enhancing management of the area. The parcel in Section 23 [, T. 8 S., R. 11 E., S.B.M.,] contains desert pupfish habitat along a tributary to Salt Creek."

(ROD at 9.) As to Group B, it stated:

"These lands are in an area designated by [FWS] as critical habitat for the desert tortoise under the Endangered Species Act. A population of approximately 50 Nelson's bighorn sheep occurs in this area and another population of approximately 100-200 sheep occurs in the Chocolate Mountains to the south. These populations migrate between the mountain ranges in the vicinity of the parcels. Nelson's bighorn sheep is a State of California fully protected species and a BLM sensitive species. Populations of Orocopia Sage, a Federal species of concern, occur on all three parcels. Acquisition of Kaiser's parcels would block up a large area of BLM managed lands and enhance management of lands used by migrating bighorn sheep."

Id. As to Group C, it stated:

that the Project was consistent with State and local programs, plans, and policies, such that "the needs fulfilled and the benefits provided by the landfill as defined by the County and analyzed in the Final EIS/EIR do not conflict with any Federal laws or regulations and that there are no overriding Federal considerations which warrant denial of the land exchange or issuance of right-of-way grants for the landfill" (*Id.* at 10-13); that, "[g]iven the mitigation and monitoring provisions as well as the analysis of impacts, *** all reasonable and practicable means have been taken to avoid or reduce adverse impacts from the Project on JTNP," and that "the subsequent project with mitigation will not significantly conflict with the management objectives in guidances [*sic*] and management plan for the nearby JTNP" (*Id.* at 13-14); that "[i]mplementation of the required

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"One of the management objectives of [the Chuckwalla Bench] ACEC is to acquire all private lands within the boundary of the ACEC primarily for management of desert tortoise habitat. This area supports one of the four major populations of the desert tortoise in California. The parcels contain Category I tortoise habitat with a density of 20-50 individuals per square mile. *** Acquisition of Kaiser's parcels in this area would contribute to consolidating Federal lands, thereby enhancing management of important desert tortoise habitat."

(ROD at 10.) Finally, as to Group D, it stated:

"Tortoise densities are estimated to be 20-50 individuals per square [mile]. Many signs of tortoise were observed on this parcel when transects were run for the biological assessment prepared for the landfill. Acquisition of this parcel would contribute to BLM's management goals of consolidating ownership of Federal lands and habitat for sensitive species." *Id.*

mitigation measures will result in the avoidance or substantial reduction of the environmental impacts to desert tortoise and desert pupfish" (*Id.* at 16); that, "after implementation of the mitigation and monitoring measures, all practical means have been taken to avoid or reduce the potential for impact to groundwater quality," and that "the Project will not result in overdrafting the groundwater" (*Id.* at 16); that, "[a]lthough the nature of the United States' interest [in the 460.63 acres within and around the campsite area] is actually less than a full fee interest, *** for purposes of appraising the value of this interest, the appraiser should value the interest as unimproved patented lands in fee (exclusive of improvements)," and that "[t]his conservative methodology would favor the United States by increasing the compensation that BLM would receive from Kaiser in exchange for these property rights" (*Id.* at 18-19); that title to lands patented under Priv. L. 790 had not reverted to the United States (ROD at 19-20), that the reversionary interest held by the United States in those lands was an "interest" that could be transferred to Kaiser in the exchange (ROD at 20), and that rights-of-way issued under Priv. L. 790 had not terminated; and that the Project involved the "irreversible and irretrievable commitments of resources" in the form of land, but that, in view of the facts that the land had already been subject to "very severe disturbances from over 40 years of mining activities" causing an existing irreversible change in the land and that "development of a landfill at a previously disturbed site, such as Eagle Mountain, avoids significant adverse impacts of locating a landfill in an area not previously disturbed," such "irreversible and irretrievable commitments of

resources" were "not sufficient to warrant disapproval of the land exchange or rights-of-way or the selection of another alternative." (ROD at 22.)

The ROD also contains a finding that "all practicable means to avoid or reduce environmental harm have been adopted." (ROD at 23.) The CDDO Manager also described three "special measures," including (1) an "Environmental Mitigation Trust" funded by a $1-per-ton contribution, the proceeds of which will allow acquisition, restoration, maintenance, and preservation of open space lands, as well as support research and education concerning conservation of natural resources and monitor the long-term effects of the Project on the desert ecosystem; (2) a "Citizens Oversight Committee," to be established by the County to oversee implementation of the landfill and to function as a "watchdog" regarding conditions imposed on the Project; and (3) the NPS/Kaiser/MRC agreement. (ROD at 23-24.)

The State Director, in denying protests against the proposed exchange, held:

> Based on the foregoing and the documentation contained in the case record, I have determined that the [ROD], dated September 25, 1997, issued by the Authorized officer of the [CDDO], is in accordance with the regulations found in Title 43 Code of Federal Regulations 2200. I conclude that the public interest will be well served by completion of this exchange transaction and your protest is hereby dismissed.

(State Director's Decision dated Dec. 9, 1998, dismissing the Charpieds' protest.)[19] The State Director also held as follows, in response to the Charpieds' assertion in their protest that the exchange of lands and right-of-way grants are not in the public's best interest:

> The public interest will be well served by the land exchange. Acquisition of private lands will consolidate Federal ownership in areas designated by [FWS] as critical habitat for the threatened desert tortoise and enhance management of habitat for the endangered desert pupfish. Conveyance of the public lands would serve the needs of State and local people as identified by Riverside County. A determination was made that there is no significant conflict with management objectives on adjacent lands, which are managed by BLM.

(State Director's Decision dated Dec. 9, 1998, dismissing the Charpieds' protest at 4; State Director's Decision dated Dec. 9, 1998, dismissing NPCA's protest at 3.)

Section 206(a) of FLPMA provides:

> A tract of public land or interests therein may be disposed of by exchange by

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[19] Similar language appears in the Dec. 9, 1998, decision dismissing NPCA's protest.

> the [Secretary of the Interior] under this Act *** where the Secretary *** determines that the public interest will be well served by making that exchange: Provided, That when considering public interest the Secretary *** shall give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife and the Secretary *** finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired.

43 U.S.C. § 1716(a) (1994).[20] In deciding what is in

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[20] We note that the language of the statute, itself, compels rejection of NPCA's argument (NPCA SOR at 2, Reply Brief at 3) that the standard should be whether the "national" interest justifies proceeding with the exchange. It is clear that, in assessing whether the "public interest" may be "well served" by completing an exchange, the use to which the selected public lands will be put by the private party is an important concern. The present case is a good example, where, as a result of granting the exchange, municipalities will have landfill capacity into the next century. This is in addition to the more direct benefit whereby habitat for protected species will be preserved in public ownership. The fact that private parties will profit from an exchange does not disqualify it. BLM has adopted a general policy of disposing of lands suitable for waste disposal to private concerns in order to avoid exposing the Federal Government to potential liability. *See* ROD at 8. We perceive no

the public interest, BLM, as the authorized officer of the Department, is required to fully consider

> the opportunity to achieve better management of Federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives, including but not limited to: Protection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values; enhancement of recreation opportunities and public access; consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient management and development; consolidation of split estates; expansion of communities; accommodation of land use authorizations; promotion of multiple-use values; and fulfillment of public needs. In making this determination, the authorized officer must find that *** [t]he intended use of the conveyed Federal lands will not, in the determination of the authorized officer, significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands. Such finding and the supporting rationale shall be made part of the administrative record.

43 C.F.R. § 2200.0-6(b); see *City of Santa Fe*, 103

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grounds to upset that policy, provided that, as here, disposal of such lands complies with relevant authority.

IBLA 397, 399-400 (1988).

While BLM is required to consider this diverse range of factors in determining whether the public interest will be well served by the exchange, it has discretion to decide how to balance all of the statutory factors when making a public interest determination. *See National Coal Ass'n v. Hodel*, 825 F.2d 523, 532 (D.C.Cir.1987); *Lodge Tower Condominium v. Lodge Properties, Inc.*, 880 F.Supp. 1370, 1380 (D.Colo.1995); *National Coal Ass'n v. Hodel*, 675 F.Supp. 1231, 1245 (D.Mont.1987), aff'd, 874 F.2d 661 (9th Cir.1989); *Burton A. McGregor*, 119 IBLA 95, 103 (1991); *John S. Peck*, 114 IBLA 393, 397 (1990). We hold that BLM has properly exercised that discretion herein. Although disposal of the selected public lands favors fulfillment of the public need for waste disposal and expansion of the Project community, BLM made every effort to balance those effects by securing important protective concessions in the manner in which the Project will be operated. Further, the acquisition of the offered private lands will provide important habitat to balance any harm to wildlife interests. The record contains ample justification for its conclusion that the public interest will be well served by making this exchange.

As noted above, contrary to NPCA's assertions (Reply Brief at 3), BLM's decision documents and supporting Draft and Final EIS/EIR contain extensive discussions of the factors set out in 43 C.F.R. § 2200.0-6(b). That record shows that the acquired private lands have substantial value as habitat for threatened and endangered species, so

that acquiring them serves the purpose of protection of fish and wildlife habitats. The position of those lands relative to current Federally-owned habitat means that their acquisition will allow for more logical and efficient management and development. We also recognize that, apart from the direct benefits of acquiring the parcels of offered private lands, approval of the exchange promotes the Project, which undeniably meets the "needs of State and local residents and their economies" by allowing both a 100-year waste disposal facility for a major metropolitan area, as well as economic development of the Project area. BLM may properly consider these factors as part of its obligation to promote multiple-use values, to fulfill public needs, and to expand communities.

Under section 206(a) of FLPMA, the Department must also find "that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired." There is no doubt that the Federal lands and interests to be conveyed here (the selected public lands) have been greatly reduced in value due to their proximity to Kaiser's mine and its spoil piles, tailing ponds, etc. (Appraisal Report Vol. I at 9-13.)[21]

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[21] We reject NPCA's assertion that BLM somehow failed to address the "value of the selected public lands to the wildlife, wilderness, scenic, recreational and cultural interests of" visitors to JTNP. (NPCA Reply Brief at 5.) BLM's Appraisal Report thoroughly describes the selected public lands, and it is evident from that description that, due to their proximity to the

Further, these lands are encumbered by mining claims held by KEM, such that they may be mined or even patented. *Id.* at 15. Against this background, it is evident that disposal of these lands in exchange for wildlife habitat plainly entails a net gain for the public.

Significant impacts of the Project on JTNP or the desert tortoise or other significant impacts could tip the balance against a determination that the public interest would be well served by approval of the land exchange. With only three exceptions, the EIS/EIR found that there will be no significant impacts, following mitigation measures.[22] We are satisfied, based on the involvement of NPS and FWS officials throughout BLM's consideration of this matter, that

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abandoned iron ore mine, they have no value as parklands. By determining in the Appraisal Report that their highest and best use was for sale for commercial purposes, BLM tacitly so concluded.

[22] The EIS/EIR acknowledged that the "projected increases in air emissions within the South Coast Air Basin resulting from the long-distance transport of solid waste and the incremental increase of emissions in the Southeast Desert Air Basin cannot be entirely avoided," and that "[i]mpacts to the California leaf-nosed bat and the Townsend's big-eared bat cannot be mitigated to below the level of significance," even with "the implementation of mitigation measures." (Draft EIS/EIR at ES-17.) Further, noting that significance criteria could not be defined to quantify impacts on "intangible components of the wilderness experience (e.g., peace, solitude)," and that CEQA requires a mandatory finding of significance in the absence of significance criteria, the EIS/EIR found accordingly that impacts to the intangible components of the wilderness experience would be significant.

these remaining impacts are not great enough to compel a finding that the public interest will not be well served by approval of the land exchange.

The Charpieds assert that the Project will adversely impact the Chuckwalla Basin aquifer, a fact that, if proven, would call into question BLM's holding that the public interest will be well served by approval of the exchange. BLM fully addressed the question of the effect of the Project on the groundwater. We are satisfied that BLM properly concluded the Project, if constructed as designed, will not result in pollution of the underlying groundwater and that, any failure of the groundwater protection system can be identified in time to prevent catastrophic damage to or destruction of that irreplaceable asset.[23]

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[23] Most of the waste materials received at the site (as much as 16,000 tons per day) would be hauled there in sealed and locked containers by rail, after processing at transfer stations (known as "Materials Recovery Facilities") in surrounding communities. The remainder (4,000 tons) would come by truck. The waste materials would be routinely screened prior to receipt at the site and periodically screened at the site, in order to ensure the removal of all excluded wastes. Also, all recyclable materials not previously removed would be removed and processed at a recycling center, which would also be operated at the landfill site. (Draft EIS/EIR at 1-6.)

The waste materials would be spread in the mine pit and covered with either (1) interim cover, in turn consisting of either a daily cover at least 6 inches thick (placed and compacted over waste at the end of each day's operation) or an intermediate cover at least 1-foot-thick (for areas that will not accept additional waste for at least 180 days) (Draft EIS/EIR at 2-34), or (2) final cover, which will overlie all of the accumulated

waste and would consist of a 2-foot-thick foundation, a 40-mil flexible geomembrane (plastic liner) with a maximum hydraulic conductivity of 1 x 10-9 cm/s, a geotextile cushion layer, a 1-foot-thick soil protection layer, a geotextile filter layer, and a 2-foot-thick erosion layer consisting of cobble- and boulder-sized material with an average particle diameter of about 18 inches. (Draft EIS/EIR at 2-38.)

In order to prevent the migration of leachate (liquid containing contaminants) to groundwater during landfill operations and thereafter, the entire waste disposal area will be lined with a high-density polyethylene geomembrane (plastic) liner, with a thickness of 80 mils, underlain by a low-permeability soil liner with a hydraulic conductivity of not more than 1 x 10-7 cm/sec and a thickness of at least 2 feet, and covered by a geotextile cushion layer. (Draft EIS/EIR at 2-26 to 2-28, Fig. 2-9.)

Further, to avoid any buildup of leachate on top of this composite liner, a leachate collection and removal system (LCRS) would be placed above the liner. Any leachate would be collected in a blanket layer of permeable drainage material (LCRS gravel), beneath a protection soil layer and geotextile filter fabric, removed by drainages to sumps, and pumped for treatment. (Draft EIS/EIR at 2-29 to 2-30, 2-40 to 2-42, Fig. 2-11.)

Landfill gas (primarily methane and carbon dioxide produced by bacterial activity associated with decomposing waste materials) will be removed from the landfill site through a horizontal grid of pipes laid at various levels in the layers of waste mass overlying the composite liner and/or vertical wells drilled down through those layers. Upon removal, the gases would be burned (flared). (Draft EIS/EIR 2-30 to 2-34; 2-41 to 2-42.)

In addition, in the base area, detectors would be placed in a "vadose zone" as required by California law. (Draft EIS/EIR at 4.1-11.) An unsaturated zone liquid monitoring layer (UZLML) will be placed below the composite liner but above another geotextile cushion and geomembrane liner and a 1-foot-thick foundation layer (Draft EIS/EIR Fig. 2-9), for the purpose of

The Charpieds also fail to show error in BLM's finding on the separate question of whether satisfying the Project's demands for water will permanently place the Chuckawalla Basin aquifer in deficit. BLM, relying on its experts, found that the Project, will not use so much water that the water table would be reduced to the point where the Charpieds would lose the use of their irrigation well. The Charpieds present their own expert's opinion stating that BLM has overestimated the availability of water in the aquifer and point out that the level in their water well (which, they assert, BLM has not monitored) is declining, showing that the aquifer is already in deficit. Professional disagreement by an appellant's expert witnesses with the findings and conclusions reached by BLM decision makers is insufficient to overturn a BLM decision. *Riddle Ranches, Inc. v. Bureau of Land Management*, 138 IBLA 82, 102 (1997); *Sierra Club*, 104 IBLA 76, 84 (1988).

The Charpieds (Charpieds' SOR at 4, 17-19) and NPCA (NPCA SOR at 4) both argue that the fact that the rail line right-of-way runs across the offered private lands reduces their value for habitat

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detecting any failure of the landfill containment system. There will also be an unsaturated zone gas monitoring system (UZGMS) below the UZLML. (Draft EIS/EIR at 2-56.) The UZGMS will consist of a series of small-diameter pipes with perforated zones at points under the landfill. These systems would monitor the migration of any landfill gas and leachate so that steps could be taken to remove them.

purposes, thus suggesting that the exchange will not, as BLM held, "secure" the "important objective" of "protection of fish and wildlife habitats" under 43 C.F.R. § 2200.0-6(b). The record demonstrates that BLM and FWS studied the potential impacts of operation of the rail line on wildlife habitat in connection with mitigation measures that would apply to those operations. (ROD at 14-15; FWS Biological Opinion at 16-23.) FWS stated as follows:

> [FWS'] Biological Opinion strikes a balance between minimizing the risk of injury from train traffic and fragmenting tortoise habitat and populations. The approach consists of two years of preconstruction monitoring *** to determine baseline conditions and a minimum three-year survey/monitoring period during project operations ***. Data obtained by these surveys would be provided to [FWS] and BLM so that the agencies could design an appropriate culvert/tortoise fence system to (1) protect tortoise from risk of train traffic, and (2) facilitate tortoise movement across (under) the railroad tracks. The survey data would be used to customize a culvert/fence design that best reflected tortoise distribution and movement needs along the railroad track. To further minimize potential risk of injury from train traffic, and for a minimum of three years, an approved biologist would precede each train trip to remove any tortoises on or adjacent to the railroad tracks. Tortoise observations would be plotted to document important use areas and refine the design of

the culvert/drift fence system.

(Memorandum dated Sept. 30, 1998, from FWS to California State Director, at 2.) The Board of Land Appeals does not have authority to review the merits of biological opinions issued by FWS under authority of section 7 of the ESA, 16 U.S.C. § 1536 (1994). Thus, an FWS Biological Opinion is not subject to administrative review as to the matters decided therein. *Southern Utah Wilderness Society*, 128 IBLA 52, 60-61 (1993); *Lundgren v. Bureau of Land Management*, 126 IBLA 238 (1993). We accordingly accept the Biological Opinion's finding that impacts to the desert tortoise from train traffic will be effectively minimized. We are not persuaded that any adverse impacts to the desert tortoise from completion of the Project have been disregarded, such that approval of the exchange would not benefit acquisition of habitat.

We reject appellant NPCA's argument (NPCA SOR at 5-6, Reply Brief at 4-5) that BLM was required by 43 C.F.R. § 2200.0-6(b) to make a finding whether the "intended use of the conveyed Federal lands" would "significantly conflict with established management objectives on" JTNP as "adjacent Federal lands." The closest point between the selected public lands and JTNP is in the NE 1/4 sec. 11, T. 4 S., R. 14 E., San Bernardino Meridian. There is a strip of lands between the selected public lands and the JTNP lands. *See* ROD Ex. B. Thus, the selected public lands (conveyed Federal lands) are not "adjacent to" any JTNP lands. As noted above, BLM's decision documents fully treat the question whether and to what extent the land exchange will

conflict with JTNP. However, BLM is not required by regulation to find that the intended use of the selected public lands as a landfill does not significantly conflict with established management objectives on JTNP.

The Charpieds assert that the selected public lands were not "categorized for disposal" (Charpieds' SOR at 4), thus suggesting that the exchange "significantly conflict[s] with established management objectives on adjacent Federal lands" in violation of 43 C.F.R. § 2200.0-6(b). We reject that contention. Under 43 C.F.R. § 1610.5-3(a), "[a] future resource management authorizations and actions *** shall conform to the approved plan." Moreover, it is clear that a land exchange, as a resource management action, is not barred because the governing plan does not "expressly provide for" the exchange. Under 43 C.F.R. § 1601.0-5(b), "[c]onformity or conformance means that a resource management action shall be specifically provided for in the plan, *or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment.*" (Emphasis supplied.) Under 43 C.F.R. § 1601.0-5(c), "['c]onsistent[']' means that [BLM] plans will adhere to the terms, conditions, and decisions of officially approved and adopted resource related plans." Therefore, the "exchange need not be specifically mentioned, so long as it is clearly consistent with the plan." *Northern Plains Resource Council v. Lujan*, 874 F.2d 661, 669 (9th Cir.1989).

BLM, following 43 C.F.R. § 2200.0-6(b)(2), correctly held that "[t]he adjacent Federal lands are

managed by the BLM under the Plan and are designated as Class M [(moderate use)] to the south and east and Class I [(intensive use)] to the north of the Project." It expressly determined that the Project "does not conflict with the current uses or uses allowed by the CDCA Plan for the adjacent Federal lands" managed by BLM under the CDCA plan. (ROD at 8; State Director's Decision dated Dec. 9, 1998, dismissing Charpieds' protest at 4; State Director's Decision dated Dec. 9, 1998, dismissing NPCA's protest at 3.) That conclusion is supported by the case record, which shows that the lands that are adjacent to the exchanged lands are Federal public domain lands that, owing to their proximity to the historically active mining area, have been made available for use rather than placed within JTNP.

Further, the CDCA Plan provides that areas designated as Class M or Class I "will be acquired, disposed of, or exchanged in accordance with FLPMA and other applicable Federal laws and regulations, to assure more efficient management of the public lands and to reduce conflicts with other public and private landowners to provide more consistency and logic in desertwide land use patterns." (CDCA Plan, § II.B.11.) Further, as BLM noted in the ROD, granting the land exchange and rights-of-way conforms with the CDCA Plan of 1980, *as amended*. Although the current guidelines (Amendment 4 of the 1985 Amendments to the CDCA Plan) dictate that "Federal lands managed by BLM may not be used for waste disposal (either hazardous or non-

hazardous),"[24] they nevertheless provide that "[l]ocations suitable for waste disposal, when found on BLM managed Federal lands, *will be transferred to other ownership through sale or exchange.*" (ROD at 8 (emphasis supplied).) The lands, having been found suitable for waste disposal, were categorized in the CDCA Plan for transfer out of Federal ownership via exchange. Disposal of these lands via exchange is clearly "consistent with" the CDCA Plan.

Appellants cite statutes that, they assert, require that the resources of JTNP be left unimpaired. None of these statues is of comfort to them. The California Desert Protection Act, 16 U.S.C. § 410aaa-21 (1994), was enacted against a background clearly showing Congressional intent that the Project not be impeded by that legislation. The House Natural Resources Committee Report contains the following statement:

> The Committee recognizes that there is a proposed Eagle Mountain solid waste disposal facility which, if developed, would be located at the site of the defunct Kaiser iron ore mine with approximately 1.5 miles of the Joshua Tree National Park. It is not the intent of the Committee that this legislation have any effect on the future development of this disposal facility at that location, and [the Committee] does not expect that such development will be affected by the site's

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[24] This policy was adopted to avoid placing the Federal Government in a position where it might be liable for damages resulting from operating a waste disposal facility.

> proximity to the park or wilderness within the park. The Committee notes that any such development will first have to meet the requirements of various federal, state, and local laws and regulations in order to be licensed; the Committee does not intend that this legislation be construed so as to impose additional regulation, beyond such current federal, state and local laws or regulation, based on the mere fact that the Eagle Mountain site is in close proximity to the park or wilderness within the park, should this facility be located at that site.

H.Rep. No. 103-496, May 10, 1994. The National Park Service Organic Act of 1916, *as amended*, 16 U.S.C. § 1 (1994), establishes NPS' mission and role, but does not impose specific legal requirements or restrictions on the management of Federal lands outside the jurisdiction of the NPS. In any event, it cannot be denied that BLM fully complied with the directive that "unique characteristics of the geographic area such as proximity to *** park lands" must be considered in evaluating impact significance. 40 C.F.R. § 1508.27(b)(3).

The Wilderness Act of 1964, 16 U.S.C. § § 1131-1136 (1994), *as amended*, of course, does impose restrictions on the treatment of lands designated as wilderness.[25] However, the record shows that the

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[25] The majority of lands within JTNP are designated as wilderness. (Draft EIS/EIR at 4.11-2.) The Charpieds (Charpieds' SOR at 24-25) challenge BLM's decision to apply

less strict noise standards for those lands that are not wilderness. (Draft EIS/EIR at 4.13-1 to 4.13-2.) Wilderness is, by definition, an area where "the imprint of man's work [is] substantially unnoticeable." *See* 16 U.S.C. § 1131(c) (1994). BLM adoption of a stricter noise standard for wilderness is consistent with its obligation to administer those lands "in such a manner as will leave them unimpaired for future use and enjoyment as wilderness." *See* 16 U.S.C. § 1131(a) (1994). No such nonimpairment mandate exists for the nonwilderness lands.

The Court of Appeal ruled on this issue. It noted the "evidence of human development" found in the nonwilderness lands in JTNP and the "County's acceptance of different thresholds of significance for impacts upon different areas of [JTNP,] depending on [their] level of wilderness." *NPCA II, supra* at 18. It held:

"We conclude that for purposes of analyzing the various 'wilderness experience' components, there is substantial evidence in the record to support the approach taken by the [EIS/EIR] and the County, to distinguish the significance of impacts according to the scientific and factual data gathered about the nature of the land affected: wilderness or nonwilderness." *Id.* at 19-20. The Court of Appeal also ruled that "the record does not support any claim that no impacts from the project, whether significant or not, whether in a wilderness area or not, should be allowable, merely because of the proximity of the project to" JTNP. *Id.* at 20. It also noted that "the significance of an activity may vary with the setting" and specifically ruled that "the County had a substantial basis for accepting the [EIS/EIR's] use of county noise standards for assessing noise impacts" in the nonwilderness areas, as "[t]here is no requirement that all noise from the [P]roject be mitigated to a level of inaudibility, particularly as to nonwilderness parklands." *Id.* at 22.

We find no basis in Federal law to conclude that no impacts should be allowable on nonwilderness areas of JTNP. We regard the EIS/EIR's distinction between effects on wilderness and

EIS/EIR carefully took into account those restrictions in evaluating the Project's impacts. See Draft EIS/EIR at Secs. 3.11 and 4.11. The only effects identified on the "wilderness as a resource" are that the Project will be "noticeable during operation and after final closure to some locations within *** the JTNP wilderness areas," and that "a small amount of windblown debris could be transported within the JTNP boundaries." (Draft EIS/EIR at 4.11-13 to 4.11-14.) The record shows that there is a community to the west of the project (Draft EIS/EIR Fig. 3.11-9) and mountains to its north and west. (Draft EIS/EIR Fig. 3.1-9.) There are 1-to-3-mile non-wilderness strips both to the south and northwest of the Project. (Draft EIS/EIR Fig. 3.11-9) All of these features effectively buffer the Project site from wilderness lands in the eastern part of JTNP and to the north of the Project site. (Draft EIS/EIR. Fig. 3.5-3; Final EIS/EIR at 6-25.) We are accordingly convinced that visual impacts and blowing trash on wilderness lands in JTNP will be minimal. The presence of these effects does not compel reversal of BLM's finding that the public interest will be well served by approval of the exchange. Similarly, although BLM acknowledges that some individuals' subjective "wilderness experience" may possibly be impacted by the presence of the Project (Draft EIS/EIR at 4.11-14) and that there is nothing that can be done to prevent that, we do not regard such impacts as compelling reversal of BLM's decision here.

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nonwilderness lands in JTNP to be well supported by governing law.

Section 206(b) of FLPMA requires that the values of the public and private lands exchanged be equal or equalized by the payment (absent waiver in appropriate circumstances) of not more than 25 percent of the total value of the land transferred out of Federal ownership. 43 U.S.C. § 1716(b) (1994); 43 C.F.R. § § 2201.3(a) and 2201.5(c)(2); See *Brent Hansen*, 128 IBLA 17, 19 (1993); *Havasu Heights Ranch & Development Corp.*, 102 IBLA 1, 7-8 (1988).

The Charpieds assert that BLM undervalued the selected public lands taken by KEM in the exchange (Charpieds' SOR at 1-2), suggesting that it did not meet the requirements of 43 C.F.R. § § 2201.3(a) and 2201.5(c)(2). NPCA also argues that BLM will not receive fair market value for the exchange. (NPCA SOR at 5-6.) It is well established that a party challenging an appraisal determining fair market value is generally required to either show error in the methodology used in determining fair market value or, alternatively, submit its own appraisal establishing fair market value. *See Voice Ministries of Farmington, Inc.*, 124 IBLA 358, 361 (1992); *High Country Communications, Inc.*, 105 IBLA 14, 16 (1988). Appellants have submitted no appraisal here. Nor have they shown error in the methodology of the appraisal. We accordingly do not agree that the public is not receiving full value for the selected public lands. In these circumstances, the BLM appraisal is properly upheld. See, e.g., *Brent Hansen*, 128 IBLA at 19; *City of Santa Fe (On Judicial Remand)*, 120 IBLA at 315; *Burton A. McGregor*, 119 IBLA at 105.

We specifically reject the Charpieds' argument

(SOR at 1) that BLM failed to properly value the reversionary interest in the tract of land they describe as the campsite/millsite lands.[26] BLM instructed the appraisers to appraise the reversionary interest in the surface estate of the tract in terms of the "fee simple estate, disregarding the [e]ffect of any title encumbrances," including the reversionary interest, and to appraise the tract "as if in a raw, unoccupied state, disregarding any of the existing improvements." (Appraisal Report, Vol. II, at iv, 4, 14.) The record indicates that these instructions resulted from an agreement between BLM and KEM which was designed to resolve the problem of how to appraise the reversionary interest, under which KEM agreed to pay for the full fee simple title to the campsite/millsite lands even though it already held the principal interest in those lands. (Letter to BLM from KEM dated May 5, 1993.) The surface estate was patented to KSC in 1955 and was being held subject only to KEM's continued compliance with the terms of the patent. So long as it did so, KEM could hold the surface estate indefinitely, subject to the possibility of reverter. We find no fault with this compromise, and appellants

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[26] Appellant NPCA argues that the offered private land (referred to as "the acquired land") "may already be federal land" because, it asserts, title had reverted to the United States, so that "the federal government may be gaining land it already owns." (NPCA SOR at 6.) Respondents (Answer at 50) point out that NPCA completely misunderstands the facts. In fact, there is no reversionary language in the deeds of any of the offered private lands, which Kaiser owns in fee. There is, accordingly, no possibility that the Federal Government already owns any of the offered private lands.

have provided no basis to disturb it. To avoid even the possibility of under-valuing its reversionary interest, BLM instructed the appraiser to value that interest as if it were a fee simple interest in the surface estate of the land, that is, as if the reverter had occurred.[27] This undoubtedly increased the value attributable to the reversionary interest, thus maximizing its value for purposes of the exchange and benefitting the United States by increasing the overall value of the selected public lands in the exchange.

We also reject the Charpieds' argument (Charpieds' SOR at 1) that, by disregarding revenue from improvements that have been built on the campsite/millsite lands, BLM undervalued the reversionary interest. That argument disregards the critical fact that, if the lands ever had reverted to the United States, those improvements could be removed. Such improvements and associated "revenue stream" belong to KSR and its successors, not to the United States, which has no claim to reimbursement for their value.

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[27] We do not agree with the Charpieds that, by setting the value of the campsite as the value of the fee simple interest of that tract, BLM admitted that the lands had reverted to public ownership. (Charpieds' SOR at 3.) Nor do we view BLM's listing of these lands as "selected public lands" on the appraisal report as an admission that the lands had reverted. (Charpieds' SOR at 10.) Contrary to the Charpieds' suggestion, the ROD makes clear that KEM is selecting the "Federal Reversionary Interest" in these lands. (ROD, Ex. A-1, p. 3.) We see nothing remotely suggesting that BLM has ever admitted that title to the lands has reverted to the United States.

By the same token, the valuation of the offered private lands is not defective because it did not include the value of railroad tracks which cross the property (*see* Charpieds' SOR at 2), as those improvements will not belong to the United States following the exchange, but will remain in Kaiser's possession on the property under authority granted by the right-of-way. In these circumstances, it was appropriate to value the lands "as if in a raw, unoccupied state, disregarding any of the existing improvements," (Appraisal Report, Vol. III at 5, 23), as those improvements can be removed by the right-of-way holder.

The Charpieds assert that the appraisal misstates the present use classification of the selected public lands as "designated for Open Space and Conservation." (Charpieds' SOR at 1-2.) We are unable to find such statement, and the Charpieds provide no citation. The Appraisal Report expressly states to the contrary that the selected public lands were "appraised based on [their] estimated highest and best use as if available in the open market, in accordance with the underlying zoning regulations, County of Riverside General Plan land use recommendations, and [CDCA] Plan land use recommendations" (Appraisal Report Vol. I at 43-44), concluding, in view of the absence of "imminent development potential," that "the highest and best use of the selected public lands is estimated to be holding for speculative investment and future capital appreciation." *Id.* at 47.

The Charpieds argue that the Notice of

Exchange Proposal (NOEP) violated 43 C.F.R. § 2201.2(a)(1), because it failed to name Kenneth Statler as a party "involved in the present exchange." (Charpieds' SOR at 2.) Appellants have failed to show that Statler, who apparently at one time held a leasehold interest in a portion of the campsite lands that has now expired, owns any interest in the lands involved in the exchange. Accordingly, we agree with KEM that he is not "involved in the present exchange" and need not have been identified under 43 C.F.R. § 2201.2(a)(1). Nor did the NOEP need to mention MWD (Charpieds' SOR at 20), which is not a participant in the exchange, but is instead the grantee of a right-of-way.

The Charpieds also argue that the NOEP violated 43 C.F.R. § 2201.2(a)(2) by not identifying 400 acres of desert tortoise habitat that KEM will donate to BLM. That "donation" is actually being made as mitigation for the expected loss of desert tortoise habitat caused by the widening of Eagle Mountain Road. We agree with KEM that it was not required to list those lands in the NOEP because, at the time of the preparation of that document, the extent of loss of habitat was not known and could not have been accurately foreseen. At this time, KEM has committed itself (as a condition of the land exchange agreement) to purchase 400 acres of tortoise habitat and donate it to the United States for preservation to mitigate expected damage to 160 acres of tortoise habitat resulting from the widening of Eagle Road. We find nothing impermissible in that. The valuation of the selected public land and offered private lands are not affected. Public involvement in this process can await the execution of the arrangement,

Both NPCA and the Charpieds argue that BLM erred by failing to take into account that title to the campsite/millsite lands had reverted to the United States because the terms of the reverter in the patent had occurred. Indeed, they presume that title to the lands has reverted and make further assumptions accordingly. *See, e.g.*, Charpieds' SOR at 2-3 (asserting that KEM's occupancy of these lands is trespass, and challenging the legality of a lease of surface rights issued by KEM to Statler). In view of the fact that BLM has agreed to deed its interest in the lands (whatever it may be) to KEM, this land exchange will resolve these questions once and for all.[28] As noted above, BLM has valued the campsite/millsite lands as if the land had already reverted to the United States. This moots the question of whether title to the lands has, in fact, reverted. In other words, since BLM has received the same value for the lands as it would have if the lands had reverted to the United States, it is unnecessary to consider whether the lands have or have not actually reverted to the United States, because the United States is in the same position either way.

Nevertheless, we affirm BLM's finding that the lands have not reverted. (ROD at 19; State Director's Decision dated Dec. 9, 1998, dismissing Charpieds' protest at 5; *see also* State Director's Decision dated

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[28] We find nothing improper in BLM's choosing to use the land exchange authority of FLPMA to accomplish this goal instead of the recordable disclaimer authority, as suggested by the Charpieds. (Charpieds' SOR at 10.)

Dec. 9, 1998, dismissing NPCA's protest at 4.) The record shows that these lands were patented to KSC pursuant to the Act of July 8, 1952, Priv.L. 790, 66 Stat. A129, on Aug. 9, 1955, pursuant to Patent Los Angeles 0121702, and that the patent contains the following provision:

> PROVIDED, That said property shall revert in fee to the United States in the event that said property is not used for a continuous period of seven years as a camp site or mill site or for other incidental purposes in connection with the mining operations of said Kaiser Steel Corporation or its successors in interest.

Even if, upon the happening of an event named in the reverter, the estate automatically terminates and the property reverts to the grántor or his successors-in-interest without the necessity for re-entry (*see State of Wyoming*, 27 IBLA 137, 164, 83 I.D. 364, 383 (1976) (AJ Frishberg, dissenting), aff'd, 602 F.2d 1379 (10th Cir.1979)), there must be a finding that the event has, in fact, happened. Such a finding by BLM is ordinarily the necessary first step in the Department's effectuating a reversion. *See, e.g., Sky Pilots of Alaska*, Inc., 40 IBLA 355, 365 (1979); *City of Monte Vista, Colorado*, 22 IBLA 107, 114 (1975); *Clark County School District*, 18 IBLA 289, 297-98, 82 I.D. 1, 5 (1975) [29] BLM has not made such a

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[29] The Charpieds and NPCA both argue that BLM lacks authority to determine whether the reverter has taken place, and that the reverter has occurred automatically, despite BLM's

finding here, and has affirmatively held that "the reversionary interests of the United States have not been triggered." (ROD at 19.) We agree.

California law governs disposition of this question, since Congress did not indicate in Priv.L. 790 that it intended for Federal law to apply. *See State of Idaho v. Hodel*, 814 F.2d 1288, 1293 (9th Cir.), *cert. denied*, 484 U.S. 854 (1987). Under California law, "there is a general legislative and judicial hostility to divestiture of properties long held by grantees." *Id.* at 1291. The California Civil Code provides that "[a] condition involving forfeiture must be strictly interpreted against the party for whose benefit it is created." Cal.Civ.Code § 1442. In accordance with this general policy, forfeiture and reversion provisions in deeds and patents are "construed liberally in favor of the holder of the estate, and construction which avoids forfeiture must be adopted if at all possible," such that "[e]ven a breach of a condition may not result in forfeiture if the grantee has 'substantially complied' with the terms of the conveyance." *State of Idaho v. Hodel*, 814 F.2d at 1292.

The question examined by BLM is whether KSC and KEM, as successor to the grantee of Patent Los Angeles 1153422, failed to use the patented lands for

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lack of action. We note that, although a party with standing to raise the issue could presumably sue in a court of competent jurisdiction either to gain a declaratory judgment that title had reverted or to quiet title based on the operation of the reverter, that has not happened.

a continuous period of 7 years as a campsite or millsite or for other incidental purposes in connection with the mining operations of KSC or its successors-in-interest. The State Director, in dismissing the Charpieds' protest, found at page 5 that "Kaiser has continued to make shipments of ore and other mineral materials and engaged in other activities incidental to mining at the site," and the record supports that finding. Although extraction and processing activities have ended, KEM has continued to use the land to coordinate the sale and shipment of iron ore and other materials that were generated during the mining process[30] and to coordinate the annual assessment work on unpatented mining claims in the area, as well as to support reclamation work on the minesite. That unquestionably amounts

---

[30] Respondents assert that, "[w]hen mineral extraction and processing activities were discontinued in 1983, hundreds of millions of tons of mining products were stockpiled at the site, including pelletized iron ore concentrates, aggregate, rip-rap, crushed rock, and decorative rock. Rather than abandoning those valuable assets, Kaiser assembled, loaded-out and shipped more than 130,000 tons of iron ore, 64,000 tons of aggregate, and 394 tons of riprap from the Eagle Mountain site to various locations between 1985 and 1992. Each shipment involved the use of the campsite and Kaiser personnel and equipment located there. In addition, Kaiser also used the campsite to process and ship several tons of coarse ore and pelletized ore from the mine in March and April of 1993."

(KEM/MRC Answer at 39-40 (citations omitted).) Appellants have not disputed these facts. Those activities were sufficient to extend KEM's title in the lands at least through April 2000, since, as Respondents point out, there has not been a continuous period of 7 years in which Kaiser failed to ship iron ore or other mineral materials from the minesite.

to using the lands "for incidental purposes in connection with mining operations." [31]

Nor do we accept the Charpieds' argument (Charpieds' SOR at 11) that the devotion of a portion of the lands to a use unrelated to mining (as a privately-owned correctional facility) triggered the reverter. The language of the reverter makes it clear that, for the reverter to operate, there must be failure to use the site for purposes incidental to mining; use of a small portion of the lands for other purposes than mining does not trigger the reverter where the site is also used as required. Finally, we reject the Charpieds' argument that title to these lands somehow reverted to the United States when KSC went bankrupt. (Charpieds' SOR at 12-13.) The patent was issued to "Kaiser Steel Corporation and to its successors," thus obviously including KEM and other entities that may have succeeded to KSC's title following its bankruptcy.

The Charpieds also argue that right-of-way LA-0121701 (issued to KSC in June 1956 to allow access to the iron ore mining operation, also under authority

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[31] Neither KEM's asserted failure to seek permission for "mining activities" nor its failure to gain mining permits are relevant to the question of whether the reverter occurred. We note, however, that the Charpieds' evident presumption that KEM must have engaged in "mining" to avoid the operation of the reverter is incorrect. KEM did not have to engage in "mining" or "mining operations" to avoid the reverter; it simply had to use the lands "for incidental purposes in connection with mining operations," something it clearly did when it sold and shipped previously-mined iron ore or other mineral materials.

of the Act of July 8, 1952, *supra*) reverted to the United States. (Charpieds' SOR at 4.) Even assuming *arguendo* that the reversion occurred, there is nothing preventing BLM from issuing a new right-of-way for other purposes. BLM has the authority to do so under FLPMA, and the records establish that its decision was within its authority. We reject the argument that activities undertaken on the right-of-way were unauthorized, as the record shows that right-of-way LA-0121701 was in effect during the time in question. [32]

The decision whether to proceed with a proposed land exchange, especially the determination whether it is in the public interest, is committed, by section

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[32] In any event, we are not persuaded that the events that would invoke the reverter of the right-of-way have occurred. The right-of-way grant provides that it must be used for "constructing, operating, and maintaining any and all works, structures, facilities, roads, railroads, power lines, and pipelines necessary, convenient, incidental, or appurtenant to the operation of the mines, camp sites and mill sites." It provides further that it "shall be subject to reversion if the rights are abandoned or not used for a continuous period of seven years by [KSC] or its successors in interest." It is plain from this language that *any* acts taken to operate or maintain facilities appurtenant to operation of the mine will avoid the reverter. There is no doubt that such activities have occurred on the right-of-way throughout the period in question. The use of the right-of-way to carry shipments of iron ore via rail is sufficient, by itself, to prevent it from reverting.

Contrary to the Charpieds' suggestion (Charpieds' SOR at 5), those activities were not "new activity," but were undertaken pursuant to existing authority of right-of-way LA-0121701. We are not aware that that right-of-way ever terminated.

206(a) of FLPMA and 43 C.F.R. Part 2200, to the discretion of BLM. 43 U.S.C. § 1716(a) (1994); 43 C.F.R. § 2200.0-6(a); *San Carlos Apache Tribe*, 149 IBLA 29, 48 (1999); Antonio J. Baca, 144 IBLA 35, 36-37 (1998); Barrett S. Duff, 122 IBLA 244, 247 (1992). It will not be overturned unless the party challenging it demonstrates that it is contrary to the law, arbitrary and capricious, not supported on any rational basis set forth in the record, or, for any reason, not in accordance with the public interest. Brent Hansen, 128 IBLA 17, 21 (1993).[33] Appellants have not met that burden here.

The State Director stated as follows concerning issuance of the two rights-of-way:

> Additionally, it is my decision to issue two (2) right-of-way grants [(CACA 35594 and CACA 31926)] under the authority of and in accordance with Title V of [FLPMA], as amended, to [KEM] to enable operation of the Eagle Mountain Landfill and Recycling Center. One of the right-of-way grants is issued to [KEM], the other issued jointly to [KEM] and the [MWD]. The rights-of-way will be used in connection with the transportation of waste to the landfill site.

(State Director's Decision dated Dec. 9, 1998, dismissing Charpieds' protest at 6; State Director's Decision dated Dec. 9, 1998, dismissing NPCA's protest at 4.)

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[33] GFS(MISC) 2(1994)

Section 501(a)(6) of FLPMA, 43 U.S.C. § 1761(a)(6) (1994), authorizes the Department to grant rights-of-way over, upon, under, or through public lands for roads, trails, or other means of transportation. *See also* 43 U.S.C. § 1761(a)(7) (1994). Approval of rights-of-way is a matter of discretion. *John M. Stout*, 133 IBLA 321, 328 (1995); *Coy Brown*, 115 IBLA 347, 356 (1990). The Board will ordinarily affirm a BLM decision approving or rejecting a right-of-way application when the record demonstrates that the decision is based on a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason is shown to disturb BLM's decision. *James Shaw*, 130 IBLA at 115; *Coy Brown*, *supra*. An appellant, as the party challenging BLM's decision, has the burden of showing adequate reason for appeal and of supporting the allegations with evidence demonstrating error. Conclusory claims of error or differences of opinion, standing alone, do not suffice. *Kings Meadow Ranches*, 126 IBLA 339, 342 (1993).

Many of the same considerations discussed above apply to BLM's decision to issue these rights-of-way. None of the indirect effects associated with the Project rise to the level that would render issuance of the rights-of-way, which make the Project possible, outside the public interest. Appellants have failed to show error in the decision to issue these rights-of-way, and we affirm BLM's conclusion that approval of these rights-of-way is in the public interest.

We note that appellants are mistaken in their assertion that "[r]ight-of-way Grant CACA-25594 was

authorized under the authority of" Priv.L. 790. (Charpieds' SOR at 4.) That right-of-way was authorized under section 501 of FLPMA. The absence of authority in the Act of June 18, 1932, 47 Stat. 324 (1932) (Charpieds' SOR at 7-8), is irrelevant to the controlling question whether BLM has the authority to issue the right-of-way under FLPMA. BLM is issuing a new right-of-way under the authority of FLPMA, which supersedes the earlier grant. The fact that the 1932 Act did not authorize use of a right-of-way in connection with a landfill is irrelevant; the question is whether FLPMA authorizes such use. BLM is not "usurping" Congress' authority as granted by the 1932 Act, as the Charpieds state; it is exercising different, independent authority under FLPMA. Nor have the Charpieds provided any evidence to support their apparent contention that granting the right-of-way will interfere with MWD's exercise of rights granted under the 1932 Act by polluting the water it provides to Southern California cities. (Charpieds' SOR at 7-8.)

To the extent not expressly addressed herein, appellants' arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decisions appealed from are affirmed.

David L. Hughes

Administrative Judge

I concur:

_____

Bruce R. Harris
Deputy Chief Administrative Judge

APPENDIX D
BLM Decision
United States Department of the Interior

BUREAU OF LAND MANAGEMENT
California State Office
2135 Bulano Drive
Sacramento, CA 95825-0451
www.ca.blm.gov

CACA-30070
CACA-25594
CACA-31926
2200/2800(P)
(CA-930)

DEC 09 1998

Certified Mail
Return Receipt Requested

DECISION

Brian Huse, Director	:	Eagle Mountain
National Park and Conservation Assoc.	:	Land Exchange CACA-30070
P.O. Box 1289	:	Rights-of-Way CACA-25594 and
Oakland, California 94604-1289	:	CACA-31926

Protest Dismissed
Right-of-Way Grants CACA-25594 and CACA-31926 Issued

BACKGROUND

The Eagle Mountain Land Exchange was proposed on September 18, 1989, by Kaiser Eagle Mountain, Inc. (Kaiser). Kaiser proposes to exchange private land containing important wildlife habitat around the Chuckwalla Valley for public land in and around the Eagle Mountain Iron Mine. Some of the public land to be exchanged is substantially disturbed from the former active operation of the Eagle Mountain Iron Mine. Disposal of the selected public land by exchange conforms with the California Desert Conservation Area (CDCA) Plan of 1980, as amended.

ISSUE #1

The NOD is premature. Because of deficiencies in the original Environmental Impact Statement/Report (EIS/R) for the project, and its subsequent invalidation, the Superior Court has retained jurisdiction over the current EIS/R. Until such time as the court rules that the new EIS/R has satisfied all of the conditions of the Writ of Mandate, BLM cannot issue a NOD for a land exchange which could result in the impairment of public lands and the resources of Joshua Tree National Park.

RESPONSE #1

Riverside County and the BLM have distinct approval roles with respect to the project. The County's role is to approve or disapprove the landfill project itself in accordance with local land use laws and the California Environmental Quality Act (CEQA). BLM's role is to approve or disapprove the land exchange that is needed for the landfill project in accordance with the NEPA and the Federal Land Policy and Management Act, as amended. The Superior Court has jurisdiction to require the County to perform additional work under CEQA; it does not have jurisdiction to evaluate BLM's compliance with NEPA or FLPMA, nor does its decision preclude BLM from moving forward with approval of the land exchange. The BLM was aware of the ongoing Superior Court litigation when it issued its Record of Decision. The Department has considered the Superior Court's final ruling and found that the ruling does not change BLM's decision.

ISSUE #2

BLM has based the NOD on a Record of Decision which fails to respond to public comments. Repeated public comments which expressed the need to address the project's potential to harm the resources of Joshua Tree National Park (JTNP) were ignored by referencing an agreement between the National Park Service and the Mine Reclamation Corp [that] provided no further analysis nor was it even subject to public review.

RESPONSE #2

The EIS analyzed the potential impacts of the landfill on JTNP. The Final EIS contains specific responses to each of the comments submitted on the Draft EIS. The signed agreement between NPS and Kaiser/Mine Reclamation Corporation was independently initiated by those parties and was not required by BLM nor a part of the Federal action. The agreement was included in the Final EIS to ensure full public disclosure and an opportunity for comment.

ISSUE #3

The land exchange has the potential to impact Federally Listed desert tortoise. BLM's stated premise that the land exchange will result in BLM receiving critical habitat is without merit. The scattered tracts of land which MRC is exchanging lie directly on the rail right of way and would lose any value once trains begin operating. Not only will the presence of trains impact the tortoise, but also the tracks themselves will segment habitat, limiting genetic diversity.

RESPONSE #3

The EIS addresses the issue of trains and an existing rail line's potential to impact desert tortoise. The U.S. Fish and Wildlife Service's 1992 Biological Opinion requires a number of mitigation measures to address this issue, such as a monitoring program for a minimum of three (3) years that requires an inspection of the rail line before each train trip to remove tortoise which may be in harm's way. At the end of the 3-year period, or earlier if deemed appropriate by the USFWS and BLM, this

monitoring program will be evaluated to determine which areas warrant placement of a barrier/culvert system to assist tortoises in crossing the tracks. Various other mitigating measures will be implemented to minimize habitat fragmentation resulting from the rail line. The USFWS reaffirmed its earlier 1992 Biological Opinion that the project with mitigation is not likely to jeopardize the continued existence of the desert tortoise and desert pupfish, nor will the project result in adverse modification or destruction of critical habitat for these species. More recently in a September 30, 1998 memorandum, the USFWS concluded that the state court's May 6, 1998, decision in *National Parks and Conservation Association v. County of Riverside* does not warrant re-initiation of the section 7 consultation process for the project and again reaffirmed the validity of its 1992 Biological Opinion. The exchange will consolidate a fragmented land ownership pattern, allowing for more effective land management.

ISSUE #4

The land exchange fails to meet the required test of being in the best interest of the American public. Impacts to air quality, Joshua Tree National Park, and congressionally designated wilderness cannot be exchanged for piecemeal tracts of land with no value to the public.

RESPONSE #4

The determination of public interest served by the land exchange was made pursuant to Section 206 of

the Federal Land Policy and Management Act of 1976, as amended (FLPMA). This determination was based in part on a finding that there is no significant conflict with management objectives on adjacent lands, which are managed by BLM. These findings were based on the analysis of potential impacts and mitigation measures in the EIS.

ISSUE #5

The NPCS questions the appraisal of and fee payment for excess BLM exchanged lands.

RESPONSE #5

Section 206 of The Federal Land Policy and Management Act of 1976, as amended, requires that exchanges of land or interest therein be for equal value. The independent appraisals of the offered private and selected public lands in the exchange were prepared in accordance with the requirements of The Federal Land Policy and Management Act, as amended, and the implementing regulations at Title 43 Code of Federal Regulations 2201.3 *et seq*. Based on the appraisals of the offered and selected lands that were reviewed and approved by BLM, this is an equal value exchange.

ISSUE #6

The NOD and land exchange violate the National Park Service Organic Act of 1916 and the 1978 "Redwood Amendments". These two statues impose a general duty on all federal agencies to avoid any "impairment" or "derogation" of the protected resources of our national parks or of the experience of

visitors within these parks. That the National Park Service has consistently opposed the Eagle Mountain Landfill because of its potential to impact park resources requires BLM to deny the land exchange.

RESPONSE #6

The National Park Service Organic Act of 1916 and the 1978 Redwood Amendments establish the National Park Service's mission and role, but do not impose specific legal requirements or restrictions on the management of Federal lands located outside the jurisdiction of the National Park Service (NPS). The EIS described these statutes and how they provide the framework for NPS's management plans and policies for JTNP. The NPS participated in the preparation of the EIS as a cooperating agency, and mitigation and monitoring measures were included in the EIS to address its concerns. After considering the NPS's comments, the BLM as lead agency decided that the land exchange is in the public interest and should be approved.

ISSUE #7

BLM cannot exchange public lands for private lands which are in dispute of ownership. The reverter clause of Public Law 790 causes Kaiser patented lands to revert to federal ownership if those lands are not actively mined for a period of 5 years.

RESPONSE #7

There is no dispute over the ownership of the 2,846 acres of private lands that Kaiser is conveying to BLM as part of the land exchange. As for the lands

patented to Kaiser under Private Law 790, Kaiser received the lands in fee subject only to the possibility of the reverter. The Department of Interior Regional Solicitor stated in his Opinion on this subject that exercise of the reversionary clause is not automatic but on the election of the Secretary of the Interior. Kaiser has continued to make shipments of ore and other mineral materials and engaged in other activities incidental to mining at the site. These activities do not support the applicability of the reversionary clause and BLM has determined that exercise of the reverter is inappropriate.

CONCLUSION

Based on the foregoing and the documentation contained in the case record, I have determined that the Record of Decision, dated September 25, 1997, issued by the Authorized officer of the Bureau of Land Management, California Desert District Office, is in accordance with the regulations found in Title 43 Code of Federal Regulations 2200. I conclude that the public interest will be well served by completion of this exchange transaction and your protest is hereby dismissed.

Additionally, it is my decision to issue two (2) right-of-way grants under the authority of and in accordance with Title V of the Federal Land Policy and Management Act, as amended, to Kaiser to enable operation of the Eagle Mountain Landfill and Recycling Center. One of the right-of-way grants is issued to Kaiser, the other issued jointly to Kaiser and Metropolitan Water District. The rights-of-way will be used in connection with the transportation of

waste to the landfill site. Copies of the right-of-way grants are available upon request from the BLM California Desert District Office, 6221 Box Springs Blvd., Riverside, CA 92507 (ph 909-697-5200).

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR Part 4 and the enclosed Form 1842-1. If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition pursuant to regulation 43 CFR 4.21- (58 FR 4939, January 19, 1993) and/or 43 CFR 2804.1 for a stay of the effectiveness of this decision during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed below. Copies of the notice of appeal and petition for a stay must also be submitted to each party named in this decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provide by law or other

pertinent regulation, a petition for a stay of decision pending appeal shall show sufficient justification based on the following standards:

(1) The relative harm to the parties if the stay is granted or denied;
(2) The likelihood of the appellant's success on the merits;
(3) The likelihood of immediate and irreparable harm if the stay is not granted, and
(4) Whether the public interest favors granting the stay.

Ed Hastey

Ed Hastey
State Director

Enclosure – Form 1842-1

Form 1842-1
(February 1985)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

INFORMATION ON TAKING APPEALS TO THE BOARD OF LAND APPEALS

DO NOT APPEAL UNLESS

1. This decision is adverse to you,
AND
2. You believe it is incorrect

IF YOU APPEAL, THE FOLLOWING PROCEDURES MUST BE FOLLOWED

1. NOTICE OF APPEAL	Within 30 days file a *Notice of Appeal* in the office which issued this decision (see 43 CFR Secs. 4.411 and 4.43). You may state your reasons for appealing, if you desire.
2. WHERE TO FILE NOTICE OF APPEAL	BUREAU OF LAND MANAGEMENT CALIFORNIA STATE OFFICE 2135 BUTANO DRIVE SACRAMENTO, CA 95825-0451
SOLICITOR ALSO COPY TO	OFFICE OF THE REGIONAL SOLICITOR U.S. DEPARTMENT OF THE INTERIOR 2800 COTTAGE WAY, ROOM E-1712 SACRAMENTO, CA 95825-1890
3. STATEMENT OF SEASONS	Within 30 days after filing the *Notice of Appeal*, file a complete statement of the reasons why you are appealing. This must be filed with the United States Department of the Interior, Office of the Secretary, Board of Land Appeals, 4015 Wilson Blvd., Arlington, Virginia 22203 (see 43 CFR Sec. 4.412 and 4.413). If you fully stated your reasons for appealing when filing the *Notice of Appeal*, no additional statement is necessary.
SOLICITOR ALSO COPY TO	OFFICE OF THE REGIONAL SOLICITOR U.S. DEPARTMENT OF THE INTERIOR 2800 COTTAGE WAY, ROOM E-1712 SACRAMENTO, CA 95825-1890
4. ADVERSE PARTIES	Within 15 days after each document is filed, each adverse party named in the decision and the Regional Solicitor or Field Solicitor having jurisdiction over the State in Which the appeal arose must be served with a copy of: (a) the *Notice of Appeal*, (b) the Statement of Reasons, and (c) any other documents filed (see 43 CFR Sec. 4.413). Service will be made upon the Associate Solicitor, Division of Energy and Resources, Washington, D.C. 20240, instead of the Field or Regional Solicitor when appeals are taken from decisions of the Director (WO-100).
5. PROOF OF SERVICE	Within 15 days after any document is served on an adverse party, file proof of the service with the United States Department of Interior, Office of the Secretary Board of Land Appeals, 4015 Wilson Blvd., Arlington, Virginia 2203. This may consist of a certified or registered mail "Return Receipt Card" signed by the adverse part (see 43 CFR Sec. 4.401C(2)).

Unless these procedures are followed your appeal will be subject to dismissal (see 43 CFR Sec 4.402). Be certain that a communications are identified by serial number of the case being appealed

NOTE: *A document is not filed until it is actually received in the proper officer (see 43 CFR Sec. 4.401(a))*

APPENDIX E
BLM Record of Decision

U.S. Department of the Interior
Bureau of Land Management
California Desert District

RECORD OF DECISION
Eagle Mountain Landfill Project
Riverside County, California

Land Exchange CACA-30070
Right-of-Way Grant CACA-25594
Right-of-Way Grant CACA-31926

September, 1997
U.S. Department of the Interior
Bureau of Land Management
California Desert District
6221 Box Springs Boulevard
Riverside, California 92507

Cooperating Agencies:
National Park Service
Biological Resources Division, U.S. Geological Survey

RECORD OF DECISION

Eagle Mountain Landfill and Recycling Center
Project
Riverside County, California

Land Exchange CACA-30070

Right-of-Way Grant CACA-25594
Right-of-Way Grant CACA-31926

Approved:

_____ _____

Henri R. Bisson, District Manager Date

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Exhibit A – Description of Federal and non-Federal Lands

Exhibit B – Map of Project Area

Exhibit C – Conditions of Approval & Mitigation Reporting/Monitoring Program Checklist

Exhibit D – Biological Opinion, September 10, 1992; Formal Section 7 Conference, September 20, 1993; Memo, September 30, 1996

United States Department of the Interior
Bureau of Land Management

RECORD OF DECISION

EAGLE MOUNTAIN LANDFILL PROJECT
California Desert District

1.0 INTRODUCTION.

This document constitutes the Record of Decision ("ROD") for the Eagle Mountain Landfill and Recycling Center Project ("Project"). The proposed action and alternatives are described, and their impacts analyzed, in the Final Environmental Impact Statement/Environmental Impact Report issued in January, 1997 ("EIS/EIR"). The Final EIS/EIR was prepared for the Bureau of Land Management ("BLM") in compliance with the National Environmental Policy Act, ("NEPA"), and the County of Riverside in compliance with the California Environmental Quality Act, California Federal Resources Code § 21000 *et seq.*, and regulations thereunder ("CEQA"), as joint lead agencies. The National Park Service and the Biological Resources Division, U.S. Geological Survey (formerly National Biological Service) acted as Cooperating Agencies under NEPA.

The federal action that precipitated the need for the EIS and this ROD was the application for a land exchange and rights-of-way by Kaiser Eagle Mountain, Inc., a Delaware corporation ("Kaiser"), whose address is 3633 E. Inland Empire Blvd., Suite 850, Ontario, CA 91764. One of the right-of-way

grants is to be held jointly by Kaiser and The Metropolitan Water District of Southern California ("MWD"), 1111 Sunset Boulevard, Los Angeles, CA 90054. The other right-of-way grant will be held by Kaiser. The land exchange and rights-of-way are a component in the proposed development of a Class III nonhazardous municipal solid waste landfill to be operated by Mine Reclamation Corporation, a California corporation ("MRC"), whose address is 43645 Monterey Ave, Suite A, Palm Desert, CA 92260.

2.0 DECISION.

I approve the land exchange as described in Section 2.1 below and Exhibits A and B with Kaiser as part of a Class III nonhazardous municipal solid waste landfill at Eagle Mountain. The final decision to issue the right-of-way grants to Kaiser and MWD, as described in Section 2.2, will be withheld pending receipt and review of any protest to the land exchange.

The Project proponent or its successors-in-interest must comply with all mitigation and monitoring measures designed for this Project and all stipulations, including those derived from the Biological Opinion prepared by the U.S. Fish and Wildlife Service.

Based on the environmental analysis of the proposed action and alternatives, I have determined that the land exchange and issuance of rights-of-way as conditioned by the adoption of mitigation and monitoring provision set forth in Exhibit C will not

cause unnecessary or undue degradation to Federal lands and resources and are in the public interest. Further, I have determined that the conveyance of the Federal lands will not significantly conflict with established management objectives on adjacent Federal lands.

The environmental analysis of the proposed action and alternatives and the mitigation and monitoring provisions, are described in the following documents: *Eagle Mountain Landfill and Recycling Center Project Final EIS/EIR (January, 1997); Eagle Mountain Landfill and Recycling Center Draft EIS/EIR* (July, 1996); the Biological Opinion for Eagle Mountain Landfill Project, U.S. Fish & Wildlife Service (September 22, 1992); "no jeopardy" confirmation (September 20. 1993): and memo continuing earlier Biological Opinion (September 30, 1996) by U.S. Fish and Wildlife Service.

2.1 Land Exchange (CACA-30070). Under the authority of and in accordance with Title II, Section 206 of Federal Land Policy and Management Act (FLPMA) of October 21, 1976, as amended, the BLM will dispose of Federal lands, including certain interests in Federal lands, and acquire lands with threatened and endangered species habitat and other environmentally sensitive lands. The Federal lands conveyed to Kaiser will be utilized in connection with the proposed landfill operation. The private lands conveyed to the BLM by Kaiser will become part of the California Desert Conservation Area (CDCA), pursuant to 43 C.F.R. § 2200.0-6(f), and will be managed in accordance with all laws, rules,

regulations and land use plans applicable to the CDCA and to special areas within the CDCA.

The legal descriptions of the Federal and non-Federal lands included in the exchange are shown in Exhibits "A-l" and "A-2," respectively, and displayed on the map attached as Exhibit "B." The serial number (casefile number) is CACA-30070. The Federal lands to be conveyed by the BLM to Kaiser consist of approximately 3,481 acres of BLM-administered lands in and around the site of the proposed Project, together with any and all interests of the United States in certain lands within and around the Kaiser Townsite previously patented to Kaiser pursuant to Private Law 790 ("PL 790") in 1955.

The non-Federal lands to be conveyed by Kaiser to the BLM consist of approximately 2,846 acres of lands containing threatened and endangered species habitat and other environmentally sensitive areas. Based on the appraised value of the exchange lands (see Section 6.1 below), a difference of $20,100 in favor of the United States has been determined between the Federal lands and the non-Federal lands. Because the Federal and non-Federal lands must be exchanged on an equal value basis, Kaiser will pay the cash value difference in the amount of $20,100 to BLM.

BLM will convey the Federal lands to Kaiser, subject only to the reservations and exceptions shown in Exhibit "A-l." Kaiser will convey the non-Federal lands to BLM, subject only to the reservations and exceptions shown in Exhibit "A-2." Such conveyances

shall include all of the parties' interest in the lands, including but not limited to any minerals, timber, grazing use, water or other interests, except for those interests specifically reserved and shown on Exhibits "A-l" and "A-2."

BLM has determined that certain lands within the proposed Project site are prospectively valuable for construction aggregates. As described in Exhibit "A-l," a reservation of all minerals in favor of the United States will be retained within these areas. If upon receipt of a plat submitted prior to patenting and showing areas where proposed surface use will preclude development of the reserved minerals, the United States shall reserve only a royalty interest in the area affected. The purpose of this reservation is to help insure the availability of construction aggregates in the Southern California market in the future. The United States will receive fair market value should any construction aggregates be severed, removed and sold for commercial purposes from the lands designated in Exhibit "A-l" as valuable for aggregate. The reservation will apply to Kaiser, its successors-in-interest, assigns, lessees, permittees and licensees.

In accordance with Section 206(a) of FLPMA and Section 2200.0-6 of the exchange regulations (43 CFR Part 2200), I have given full consideration to better Federal land management and the needs of State and local people and their economies. It is my determination that the resource values and Federal objectives on the BLM lands are less than the resource values and Federal objectives gained by acquisition of the non-Federal lands and, therefore,

this land exchange is in the public interest, and does not significantly conflict with established management objectives on adjacent Federal lands.

2.2 Rights-Of-Way. Under the authority of and in accordance with Title V of FLPMA, as amended, two right-of-way grants will be issued to Kaiser to enable operation of the Eagle Mountain Landfill and Recycling Center. One of the right-of-way grants will be issued to Kaiser; the other right-of-way grant will be issued jointly to Kaiser and MWD. The rights-of-way will be used in connection with the transportation of waste to the landfill site. MRC will have the use of the rights-of-way and will be bound by all stipulations applicable to the rights-of-way as the Kaiser lessee.

Kaiser Right-of-Way: Rail Line and Eagle Mountain Road Extension (CACA- 25594). A right-of-way comprising an aggregate of approximately 28.6 miles in length with an average minimum width of 200 feet and various widths for drainage purposes will be granted to Kaiser along the existing 52-mile Eagle Mountain rail line, on those portions of the rail line which currently traverse BLM managed lands, between Eagle Mountain and Ferrum Junction on the northeast coast of the Salton Sea. This right-of-way also includes a small portion of land for a new rail spur proposed to be constructed from the existing Eagle Mountain rail line to a container handling yard located within the Project site. It also includes the extension of Eagle Mountain Road going northeast from MWD's Eagle Mountain Pumping Station to the landfill site. This right-of-way for the road extension is approximately 3 miles

long and of variable width averaging 110 feet wide. The rail line and the extended Eagle Mountain Road are depicted within Exhibit "B."

Kaiser/MWD Right-of-Way: Eagle Mountain Road (CACA-31926). Waste transported by truck would access the landfill site over the existing Eagle Mountain Road and an extension of that road. A FLPMA right-of-way will be granted to Kaiser and MWD for joint use of the existing Eagle Mountain Road, beginning just north of Interstate 10 and ending just south of MWD's pumping station. This right-of-way is approximately 6.75 miles long and of variable width averaging 110 feet wide. The extended Eagle Mountain Road is depicted in Exhibit "B."

3.0 ALTERNATIVES INCLUDING THE PROPOSED ACTION.

Seven alternatives, including the Proposed Action, were evaluated in detail by the BLM and the County of Riverside. Details regarding the Proposed Action and alternatives are set forth in the Draft and Final EIS/EIR and are briefly summarized below.

3.1 The Proposed Action (BLM's Preferred Alternative). The proposed action (the Project), which is the BLM's preferred alternative, consists of (i) the BLM/Kaiser land exchange and FLPMA rights-of-way authorization, (ii) the proposed utilization and eventual reclamation of an abandoned deep pit iron ore mine located in Northeastern Riverside County, approximately 10 miles north of Interstate 10 in the vicinity of the communities of

Desert Center. Lake Tamarisk and Eagle Mountain for use as a Class III nonhazardous municipal solid waste landfill, and (iii) the renovation of the adjacent Eagle Mountain Townsite to provide housing for landfill workers and their families, and the consequent repopulation of the Townsite.

The landfill portion of the Project will comprise about 2,164 acres, and the remaining 2,490 acres will be used for landfill support facilities and open space. For the landfill a composite liner will be constructed and maintained beneath the base of the landfill and on the side slopes. Under the landfill Specific Plan's phasing requirements, the deepest end of the east pit will be the last area of the Project to be landfilled (approximately 75 years after start-up of landfill operations, if the County Development Agreement's 50-year term is extended prior to its expiration to at least 75 years), and a minimum depth to groundwater of 125 feet will be required in the deepest end of the east pit. The Project also comprises access improvements (including facilities for railroad and truck transport of refuse) and post-closure site reclamation and monitoring.

At full operation, the landfill will accept up to 20,000 tons per day of nonhazardous municipal solid waste from seven Southern California counties. However, the County of Riverside will initiate formation of an independent panel of scientists and engineers who will review compliance with approvals and permits before the proponent can proceed to accept waste from outside Riverside County in excess of 10,000 tons per day. Up to 18,000 tons of waste per day will be shipped in containers along the Southern

Pacific Railroad to Ferrum Junction. From there, the trains will use the 52-mile Eagle Mountain Railroad to the proposed landfill site. Up to 2,000 tons per day of containerized waste will be delivered by truck to the site. For the first three years of operation, waste will be transported to the landfill by either rail or truck from any of the seven source jurisdictions. After three years, waste from outside the desert areas of Riverside County will be transported only by train. The number of transfer trucks that will be accepted at the landfill site will be limited to 100 per day for the life of the Project.

Waste delivered to the landfill will be accepted only from solid waste facilities serving jurisdictions within the State of California that are in compliance with the California Integrated Solid Waste Management Act of 1989 (California Federal Resources Code Section 40000 *et seq.*, or "AB 939"), as more fully described in Development Agreement No. 64 approved by the County. All waste that arrives at the landfill site, other than local waste from the Chuckwalla Valley, will be accepted only after processing at properly permitted Materials Recovery Facilities or Transfer Stations. The waste will be inspected at three different points before disposal into the landfill.

The other component of the Project, the Eagle Mountain Townsite, is an existing, but under utilized, former mining community located directly south of the proposed landfill site on approximately 429 acres. The proposed renovation and repopulation of the Townsite will provide planning standards consistent with existing infrastructure already

located within the Townsite and improvements to the currently unoccupied housing stock, similar to the improvements previously made by Kaiser to the currently occupied homes within the Townsite.

3.2 No Action (Environmentally Preferable Alternative). The No Action alternative would leave the Project site in its present condition, and avoid the potential impacts of the proposed landfill. There would be no land exchange with or rights-of-way granted to Kaiser. The No Action alternative, however, would result in the continuation of the adverse visual impact of the disturbed former mining site and the remaining tailings piles. The potential direct and indirect impacts associated with"continued reliance on new or existing landfills in Southern California could produce adverse air quality impacts and/or ground water impacts at existing, unlined landfills. In addition, other Project objectives could not be achieved under the No Action alternative, including the acquisition and further federal consolidation of lands containing endangered and threatened species habitat. However, with respect to the impacts in the vicinity of the Project site, the No Action alternative is, on balance, the environmentally preferable alternative in terms of direct impact on the human environment.

3.3 Reduced Volume of On-Site Disposal. This alternative would allow for the disposal of up to 16,000 tons per day of waste, including up to 14,000 tons per day by rail and up to 2,000 tons per day by truck. The landfill operating conditions would be similar to the Proposed Action.

Activities associated with the Townsite would remain the same as the Proposed Action. The land exchange would occur, and the rights-of-way would be issued.

3.4 Alternate Road Access. Under this alternative, transfer trucks would use the existing Kaiser Road to bring waste to the site, instead of the existing Eagle Mountain Road and its proposed extension. All other features of the Project would remain the same as the Proposed Action. The land exchange would occur, and the railroad right-of-way (but not the rights-of-way for Eagle Mountain Road, as extended) would be issued. This alternative would result in an additional 7.5 miles round trip for each truck.

3.5 Rail Access Only. This alternative would eliminate the use of all non-local area refuse-hauling trucks to the landfill site, resulting in the reduction of capacity of the landfill to 18,000 tons per day. This alternative would preclude transporting waste by truck from the Coachella Valley area of Riverside County. All other features of the Project would remain the same as the Proposed Action. The land exchange would occur, and the rights-of-way would be issued.

3.6 Landfill on Kaiser Land Only. This alternative would allow for the operation of the landfill without implementing the land exchange between the BLM and Kaiser; the land exchange would be modified to include only the United States' interest in the PL 790 patented lands. The rights-of-way would still be issued. The landfill would consist only of Kaiser-owned lands within and around the

East Pit. The landfill footprint would cover an area of approximately 289 acres and would accept a maximum of 10,000 tons per day of municipal solid waste. A lower rail yard east of the landfill would not be built. Landfill design, development, operation, environmental monitoring and closure and postclosure would be as described for the Proposed Action. This alternative would result in the BLM maintaining title to the previously mined lands and Kaiser transferring only a small portion of its open space lands to BLM.

Under this alternative, Kaiser would need to release its Sunrise mining claim over a 20-acre inholding located within Section 36 of Township 3S, Range 14E, which would allow the transfer of the property to the State of California. Kaiser would then acquire the parcel from the State or secure a lease or permit from the State to use the property.

3.7 Landfill Development/No Townsite Development. Under this alternative the landfill portion of the Project would proceed as proposed, but the renovation of existing structures and repopulation of the Townsite would not occur. It is assumed that under this alternative employees working at the landfill and other facilities would commute to the site from Desert Center, Blythe and other communities. The Townsite would remain essentially unchanged from the existing condition, but the landfill would be developed. The land exchange would occur, and the rights-of-way would be issued.

3.8 Alternatives Considered But Eliminated From Detailed Analysis. Some potential alternatives to the Proposed Action were considered and discussed in the EIS/EIR but eliminated from a detailed analysis. The following alternatives were rejected as not being feasible because they did not meet the basic objectives, purpose and need of the Project.

3.8.1 Landfill on Other Kaiser Properties. These potential alternative site locations were eliminated from detailed analysis in the EIS/EIR because (a) the Black Eagle Pit (North) is closer to the ridge line and the boundary of Joshua Tree National Park ("JTNP"), increasing the potential for the landfill to be visible from within JTNP; (b) the location of the Black Eagle Pit (South) more than four miles west of the existing and planned landfill site infrastructure would result in cost inefficiencies and increased air emissions from the transport of waste to the landfill from the onsite rail yards and truck marshalling yards; (c) the Central Pit is more distant from the proposed rail yard than the Project, and is at a substantially higher elevation, making the site operation economically infeasible for the applicant. The Black Eagle Pit and the Central Pit overlie the upper reaches of the Pinto Basin aquifer which flows towards JTNP.

3.8.2 Waste Diversion. This potential alternative, which generally consists of recycling, municipal solid waste composting and source reduction, is not a feasible alternative to the Project. Notwithstanding the efforts of municipalities to implement source reduction and recycling programs,

there are a large number of known and unknown factors which have adversely affected such programs, including highly volatile markets for recyclables, shipping and transportation costs, facility and program costs associated with diversion programs such as composting, and economies of new recycling and disposal technologies. These external costs associated with waste diversion make this alternative infeasible, since recycling and source reduction in excess of the AB 939 mandates will not eliminate the need for disposal capacity. The Proposed Action was analyzed in the EIS/EIR assuming full compliance with the waste diversion mandates of the State of California's AB 939, and the EIS/EIR fully analyzed the short-term, medium-term and long-term capacity needs of the Southern California region assuming municipalities' compliance with AB 939 mandates. The EIS/EIR concluded that two or three regional landfills comparable in size to the proposed Project could be needed over the long term.

3.8.3 Off-Site Landfill Locations. The potential alternatives of proposed off-site landfill locations were rejected as not feasible alternatives to the Proposed Action, because they do not meet several important and basic objectives of the Project, including reclamation of Kaiser's abandoned iron ore mine, federal acquisition and consolidation environmentally sensitive lands, and the development of an economically beneficial Class III nonhazardous municipal solid waste landfill disposal site in the County of Riverside.

Proposed regional landfills at other locations outside of Riverside County would, if successful, help

in some measure to address the Southern California region's long-term waste disposal needs, but they would not accomplish the reclamation of the Kaiser mine site. Moreover, simply because other proposed landfill Projects, including the conditionally approved Rail-Cycle Project in San Bernardino County and the approved Mesquite Landfill in Imperial County, would be considered as potential business competitors does not accord those Projects status as "alternatives" under NEPA.

Further, the EIS/EIR fully discusses the lone-term need for waste disposal capacity in the Southern California region, and the need for more than one regional landfill to provide this long-term capacity. Given the medium and long-term capacity shortfall Projected for Southern California, the EIS/EIR concludes that two or three regional landfills could be necessary to provide disposal capacity over the long term. These sites are not mutually exclusive, and for this reason the EIS/EIR properly examines these sites in the context of their potential cumulative impacts. Accordingly, the EIS/EIR discusses the full range of anticipated and potential impacts from the Project, individually as well as cumulatively with other landfill Projects, as required by NEPA.

With respect to other landfill sites located outside of the State of California, these sites were properly eliminated from detailed consideration given (a) the uncertainty of whether these sites have adequate capacity to address the Southern California regional solid waste disposal capacity needs, (b) the potential for disposal fees associated with these sites to significantly increase, (c) the potential for revisions to

existing laws and regulations that could adversely affect the accessibility of these sites, (d) political and social opposition to disposal of waste at out-of-state locations which are not governed by California's environmental review process, and (e) the County of Riverside's lack of control over these sites.

3.8.4 Landfill Mining. Landfill "mining," which consists of excavating previously disposed of materials from landfills, reclaiming landfill cover and potentially valuable materials in the fill, and thereafter landfilling the remainder is not a feasible alternative to the Project. As discussed in the EIS/EIR, landfill mining is not a practicable option for providing long-term regional landfill disposal capacity due to (a) health concerns due to excavation of wastes, including air quality impacts, (b) limited application of landfill mining technology to certain waste types, (c) the case by case need to document known costs of landfill mining, and (d) the associated regulatory approval process which is costly and time consuming. The EIS/EIR concludes that the potential landfill disposal capacity which could be created by landfill mining a few sites within the County would not provide a sufficient amount of disposal capacity for the anticipated shortfall in capacity for the Southern California region. Further, this alternative would not address one of the objectives of the Project, the reclamation of the former Kaiser mine site.

3.8.5 Alternative Townsite Locations. The EIS/EIR determined that relocation or redevelopment of a new Townsite at a different location would itself generate significant new environmental effects, due to the use of energy resources and the creation of air.

water, traffic and other impacts of construction of a new Townsite.

3.8.6 Alternative Townsite Land Use and Densities. The EIS/EIR determined that altering land uses and densities within the Townsite would result in the potential for increased environmental impacts, including traffic and the destruction of existing homes and home sites. Setting aside more land for manufacturing or industrial uses would provide more jobs, but would require a reduction in Townsite open space and residential areas.

4.0 MANAGEMENT CONSIDERATIONS.

Based upon a careful examination of the EIS/EIR, Federal comment, and after consultation with the NPS/JTNP, Biological Resources Division U.S. Geological Survey, the County of Riverside, and other appropriate Federal, State agencies, and local government agencies, I have concluded that the proposed action is consistent with BLM management goals and complies with FLPMA. Development of a landfill at a previously disturbed site and adoption of mitigation measures ensures that all reasonable means to avoid or reduce environmental harm have been incorporated into the Project. It is my determination that the acquisition of non-Federal land exceeds the values of Federal lands and interest to be conveyed. I also find that the use of the conveyed lands subject to mitigation and monitoring described in the EIS/EIR will not significantly conflict with established management objectives on adjacent Federal lands and nearby Federal lands.

The following factors were considered in arriving at my decision:

4.1 Conformance with California Desert District Land Use Plan: I have reviewed all of the relevant documents and concluded that the proposed land exchange and issuance of right-of-way grants for the Eagle Mountain Project conform with the *California Desert Conservation Area (CDCA) Plan* of 1980, as amended. The Project area is designated Class M and Class I. The current guidelines, pursuant to Amendment 4 of the 1985 Amendments to the CDCA Plan state that in Multiple-Use Class M (moderate use) and Multiple-Use Class I (intensive use): "Federal lands managed by BLM may not be used for waste disposal (either hazardous or non-hazardous). Locations suitable for waste disposal, when found on BLM managed Federal lands, will be transferred to other ownership through sale or exchange." The proposed landfill site has been evaluated for its suitability as a waste disposal site. The analysis identified Federal lands suitable for the Project. In accordance with the CDCA Plan, these lands can be transferred out of Federal ownership for use as a solid waste landfill.

The adjacent Federal lands are managed by the BLM under the CDCA plan and are designated as Class M to the south and east and Class I to the north of the Project. The Project does not conflict with current uses or uses allowed by the CDCA plan for the adjacent Federal lands.

4.2 Acquisition of Important Wildlife Habitat: The proposed land exchange presents an

opportunity for BLM to achieve better management of Federal lands by allowing BLM to consolidate Federal ownership of land that contains habitat for listed species. In the land exchange, BLM would acquire approximately 2,846 acres of Kaiser lands, which contain important habitat for the desert tortoise, a Federally listed threatened species, and for the desert pupfish, a Federally listed endangered species, and for other environmentally sensitive species. In addition to the lands acquired as part of the land exchange, BLM also would acquire approximately 400 acres of desert tortoise habitat for mitigation of impacts caused by the Project. This land would be purchased by the applicant, and then would be conveyed in fee to BLM as mitigation for the loss of 160 acres of tortoise habitat, which would be used for widening and extending the Eagle Mountain Road as part of the Proposed Action. Given the lands to be acquired, including the mitigation land, the land exchange would further BLM's objective of securing additional protection of important habitat for sensitive species.

The Kaiser lands to be acquired by BLM in the land exchange are located in four geographic areas (see Exhibit "B"). The location of these lands, and the environmental benefits associated with their acquisition, are summarized as follows:

Group A: Salt Creek (Dos Palmas) ACEC

T. 8 S., R. II E.

Section 13: NE1/4
Section 21: E1/2E1/2SE1/4
Section 23: Described in metes and bounds.

These three parcels are located in the vicinity of the Salt Creek (Dos Palmas) Area of Critical Environmental Concern (ACEC). The entire ACEC area of about 14,000 acres includes both Federal and private lands and is popularly referred to as Salt Creek (Dos Palmas) ACEC, even though the ACEC only includes the Federal lands. One of the management objectives in the Salt Creek (Dos Palmas) area is to acquire private lands for the management of various palm oases and seeps that provide habitat for the desert pupfish and Yuma clapper rail, both Federally listed endangered species. Over 3,200 acres have been acquired or are in the process of being acquired by BLM. All three of Kaiser's parcels will contribute to consolidating Federal lands, thus enhancing management of the area. The parcel in Section 23 contains desert pupfish habitat along a tributary to Salt Creek.

Group B: Orocopia Mountains Wilderness

T. 7 S., R. 12 E.

Section 35: Described by metes and bounds

Section 36: N1/2SW1/4, SE1/4NW1/4, S1/2NE1/4

T. 7 S., R. 13 E.

Section 31: Described by metes and bounds

These three parcels are located on the southern boundary of the Orocopia Mountains Wilderness Area. They are not contiguous to the Wilderness Area. However, consolidation of Federal lands in this area would simplify land management and enhance recreational opportunities. These parcels are in an

area designated by the USFWS as critical habitat for the desert tortoise under the Endangered Species Act. A population of approximately 50 Nelson's bighorn sheep occurs in this area and another population of approximately 100-200 sheep occurs in the Chocolate Mountains to the south. These populations migrate between the mountain ranges in the vicinity of the parcels. Nelson's bighorn sheep is a State of California fully protected species and a BLM sensitive species. Populations of Orocopia Sage, a Federal species of concern, occur on all three parcels. Acquisition of Kaiser's parcels would block up a large area of BLM managed lands and enhance management of lands used by migrating bighorn sheep.

Group C: Chuckwalla Bench ACEC

T. 6 S., R. 14 E.
Section 16: W1/2WI/2
Section 21: Wl/2
T. 7 S., R 14 E.
Section 5: All

These three parcels are located in the Chuckwalla Bench ACEC. These parcels are in an area designated by the U.S. Fish and Wildlife Service as critical habitat for the desert tortoise under the Endangered Species Act. One of the management objectives of this ACEC is to acquire all private lands within the boundary of the ACEC primarily for management of desert tortoise habitat. This area supports one of the four major populations of the desert tortoise in California. The parcels contain Category I tortoise habitat with a density of 20-50 individuals per square mile. Many signs of tortoises

were observed when transects were run for the biological assessment prepared for the landfill. Thus far, over 32,000 acres of private land inside the Chuckwalla Bench acquisition area have been acquired. Acquisition of Kaiser's parcels in this area would contribute to consolidating Federal lands, thereby enhancing management of important desert tortoise habitat. The BLM has also placed a high priority on acquiring easements and land along Summit Road which crosses Kaiser's properties in order to provide Federal access to the historic Bradshaw Trail.

Group D: Chuckwalla Valley
T. 5 .S., R. 14 E.
Section 27: N1/2, N1/2S1/2

This parcel is located just north of Interstate 10 in the Chuckwalla Valley. Although this parcel is not inside any specially designated management area, it is in an area designated by the U.S. Fish and Wildlife Service as critical habitat for the desert tortoise under the Endangered Species Act and is adjacent to a large block of BLM managed lands to the north. Tortoise densities are estimated to be 20-50 individuals per square. Many signs of tortoises were observed on this parcel when transects were run for the biological assessment prepared for the landfill. Acquisition of this parcel would contribute to BLM's management goals of consolidating ownership of Federal lands and habitat for sensitive species.

4.3 Consistency with State and Local Programs, Plans and Policies. BLM is required under Title II of FLPMA, to the extent consistent

with the laws governing the administration of the Federal lands, to coordinate management activities with the land use planning and management programs of other Federal departments and State and local governments within which the lands are located. Under the land exchange regulations, BLM is required to give full consideration to the opportunity to meet the needs of State and local residents and their economies.

Notification to State Lands Commission Pursuant to Section 707 of the California Desert Protection Act: Under Section 707(c) of the California Desert Protection Act (CDPA), no federal agency may dispose of any Federal lands (or interest in lands) within the State of California without first providing notice to the California State Lands Commission ("SLC") of the availability of those lands. The BLM and SLC have entered into an agreement pursuant to the provisions of the California Desert Protection Act whereby BLM lands with pending actions would not be accepted by the SLC, including BLM lands that were the subject of applications submitted prior to November 1, 1994. BLM re-notified the SLC of the proposed exchange, and the SLC confirmed that it has no interest and will not seek an exchange of these Federal lands under Section 707 of the CDPA.

County of Riverside Approval of Proposed Action. The County of Riverside determined that the Eagle Mountain Landfill Project would fulfill regional and local needs and would provide benefits to the County in their approval of the Project (Resolution

No. 97-236). The major needs fulfilled and benefits provided by the Project are summarized below:

Providing Landfill Capacity for Seven-County Region. The waste disposal capacity of the seven major counties in Southern California was analyzed in the EIS/EIR. The California Integrated Waste Management Board (CIWMB) concluded that if all cities and unincorporated County areas in Southern California comply with the 50 percent waste diversion requirement, six counties in Southern California, including Riverside, Los Angeles, San Bernardino, San Diego, Ventura and Santa Barbara, will still have fewer than 15 years of existing permitted disposal capacity. State law (AB 939) mandates that counties have 15 years of existing permitted disposal capacity. Also, several landfills in the region have closed during the past nine months, and other sites for potential new landfills have been eliminated from consideration. While certain landfills have received approval for expansion during this time period, the net loss in daily permitted disposal capacity was approximately 20,700 tons per day.

Providing Landfill Capacity for Riverside County. With respect to Riverside County, short-term disposal needs could occur as early as the year 2002 for the eastern portion of the County, particularly in the Coachella Valley. With respect to the County's medium-term disposal needs, the entire County may experience a shortfall by the year 2008 or sooner because of the limits on the daily permitted capacity of different landfills. The landfill would serve as a component of the County's regional integrated waste management system and is expected to accommodate

a substantial portion of the County's waste disposal needs for the long term.

Furthering State-Wide Waste Diversion Requirements and Compliance with AB 939. The Project will further the State's directive to all counties to increase levels of waste diversion pursuant to the requirements of Assembly Bill 939, the California Integrated Waste Management Act (AB 939). This state law requires that local jurisdictions achieve waste diversion goals — recycling 25% of the solid waste stream by 1995, and 50% by 2000. In furtherance of this requirement, waste will be accepted at the Eagle Mountain landfill only if it has been processed in accordance with the requirements of AB 939. The recovery of recyclable materials will assist the counties using the Project to meet the source reduction goals of the AB 939. The County also determined that the Project will assist the County in complying with AB 939, which requires the County to provide adequate solid waste disposal capacity for both its present and reasonably anticipated needs.

Providing Waste Disposal Facility that Meets or Exceeds all State and Federal Requirements. The Project will be the only landfill in Riverside County which meets current groundwater protection and other current state and Federal environmental protection requirements, thus providing sufficient waste disposal capacity to enable the County to close existing landfills that do not meet current state and Federal Regulations.

Increasing County Revenue and Employment. Based on economic reports prepared by experts, the Proipgt is Projected to generate $210 to $280 million in revenue to the County in the first twenty years of operation. That additional revenue can be used to provide needed Federal services to the residents of Riverside County. The Project will also support or save, on an annual basis, an average of 1,354 jobs in the County during the first 20 years. The overall economc impact during the next 20 years to the County is Projected to be in excess of $3 billion.

Revitalizing Eagle Mountain Townsite. Presently, the Eagle Mountain Townsite is largely vacant, underutilized and in disrepair in some areas. The Project calls for the revitalization and repopulation of the Townsite, which would make use of the existing infrastructure and houses. Thus, the Project will bring social and economic benefits to the area.

I have determined that the needs fulfilled and the benefits provided by the landfill as defined by the County and analyzed in the Final EIS/EIR do not conflict with any Federal laws or regulations and that there are no overriding Federal considerations which warrant denial of the land and exchange or issuance of right-of-way grants for the landfill.

4.4 **Impacts to Minerals:** Sand and gravel located on the eastern selected properties, valuable as construction aggregate, was identified by P. K. Morton in the *Mineral Potential Report*. The Morton report was reviewed and amended by the BLM California Desert District to reflect a market analysis of the mineral potential. Although a current market

for sand and gravel does not exist, demands will be placed on deposits in areas where previous development and a mining infrastructure exists, making the property "prospectively valuable." Therefore, the BLM has determined that a reservation is applicable ensuring that the United States receive a fair market value for any construction aggregates severed, removed and sold for commercial purposes from the property. Market demand for a desert source for mineral materials is increasing due to limited access and availability in the Los Angeles Basin. Areas within the desert bio-regions of southern California are currently undergoing land use planning decisions for the protection of the desert tortoise, which will put large areas of alluvial material off-limits to sand and gravel development. It is important that the BLM assures mineral materials are available to meet local, regional, and State needs.

The affected ore deposits on the Project site represent less than one percent of the economically recoverable iron ore reserves in the United States. However, since it has been determined that the landfill operation could render portions of these existing iron ore reserves un-minable, landfill operations will be phased to assure that the iron ore most feasible to mine are impacted last to allow for recovery, if ore recovery becomes economically feasible.

The Morton report concluded overall that the Federal lands were judged to have low potential for iron and gold mineral resources. Morton examined the Federal lands and found that a few gold veins of

the Black Eagle Mine type are scattered throughout the property. Analysis of samples taken and the opinion of Morton was that these veins did not contain sufficient ore to be considered valuable. Kaiser also examined the property for gold during the late 1960's and concluded that there was not sufficient mineralization to warrant economic development.

The Federal lands are not currently classified by the BLM as being valuable, prospectively or otherwise, for leasable minerals or Geothermal Steam Act minerals.

Kaiser indicated in a memorandum that the subject non-Federal parcels are without value. The BLM examined the non-Federal parcels and completed a mineral evaluation of the non-Federal lands as required by BLM policy. The BLM concluded that the non-Federal lands did not contain minerals of economic value that could be developed under the United States mining and mineral leasing laws. As such, the probability that future development of mineral resources on the non-Federal parcels interfering with the purpose and intent of acquiring the parcels is low.

4.5 Impacts to Joshua Tree National Park: An important concern to the BLM, the National Park Service (NPS), the Federal and the Joshua Tree National Park (JTNP), a cooperating agency, is the proximity of the Project to JTNP. The Project is about 1.5 miles from JTNP at its closest point and about 3 miles from wilderness area within JTNP. JTNP is a Class I air quality unit under the

Clean Air Act and a designated World Biosphere Reserve. It was designated as a National Park and its boundaries extended by the California Desert Protection Act (CDPA) of 1994. The CDPA legislative history indicates that Congress was cognizant of a proposed solid waste landfill in proximity to JTNP and wilderness.

The EIS/EIR reviewed the NPS guidance and policies for all National Parks (*Natural Resources Management Guidelines*. NPS-77, 1991) as well as JTNP's *General Management Plan and Final EIS* (1995) and *Natural Resources Management Plan* (1993). JTNP is developing a wilderness and backcountry management plan which includes the newly incorporated lands. These documents provide operating policies and set management objectives for JTNP. In cooperation with JTNP, the EIS/EIR addressed issues that potentially affect the National Park and its uses. The principle issues were: windblown debris, visibility, nighttime lighting, odor, noise, visual, groundwater resources, biological resource (see Sections 4.6. 4.7. 4.8), and wilderness.

To prevent windblown litter from affecting JTNP as well as adjacent lands, mitigating measures such as portable litter fences, litter patrol and minimize exposure of landfill face were developed. Odor and noise (vehicles, trains, landfill operations and construction) were analyzed, and impacts were indiscernible. Nighttime lighting including gas flare (part of gas collecting system) was analyzed in the EIS/EIR for impact to nighttime character and to sky glow. With the use of downward directed lighting and use of shields to cut off upward radiation and cut-off

type of lighting, there will be no change in existing nighttime character and no impact from sky glow. Regarding visual impacts , the Project area is already disturbed from prior mining operations, existing utility infrastructure, townsite structures and a prison. While for hikers and backpackers the Project could be visible from the boundary, it would not change the existing contrast and disturbance. For Park users at more distant Park facilities (40 miles), they would not be effected.

Analyzing the impact that the Project will have on an individual's wilderness experience, the EIS/EIR states that the Project can have an adverse impact on an individual's wilderness experience. The wilderness experience is a subjective experience which is unique to an individual's interaction with wilderness. For some individuals that cannot be mitigated.

JTNP expressed concern about the relationship between springs in JTNP and the Project area's aquifer. Based on hydrogeologic analysis, there is no association between the two, and no impact will result.

Of concern to NPS was potential visibility impact from plumes from the project to park visitors. In consultation with NPS and using an EPA approved model, the EIS/EIR modeled the visibility of all project emissions. The EIS/EIR states that the visibility impact is "not significant" based on the limited number of hours (39 hours) when impacts may occur, the time of day and year when impacts may occur, and based on impacts occurring in areas receiving very little Park use. As described in the

EIS/EIR, it is the NPS's position, as Federal manager of Class I site, that based on the number of hours, the modeled plumes were a "significant impact" due to the number of hours and location in the Park. Notwithstanding, NPS position as Federal land management of Class 1 area, the Project with mitigation does not exceed the Class I area increments for any pollutant and a Prevention of Significant Deterioration (PSD) review is not required.

Given the mitigation and monitoring provisions as well as the analysis of impacts, I have determined that all reasonable and practicable means have been taken to avoid or reduce adverse impacts from the Project on adjacent JTNP. It is further my determination that the exchange and the subsequent project with mitigation will not significantly conflict with the management objectives in guidances and management plan for the nearby JTNP.

4.6 Impact to Desert Tortoise and Desert Pupfish: The protection of the desert tortoise and desert pupfish during construction and operation of the Project was a concern for the BLM, U.S. Fish and Wildlife, California department of Fish and Game and members of the Federal.

In compliance with Section 7 of the federal Endangered Species Act, the BLM consulted with the U.S. Fish and Wildlife Service ("USFWS") on the potential impacts of the Project on the desert tortoise (a federally listed threatened species) and the desert pupfish (a federally listed endangered species), and measures to mitigate such impacts. The USFWS

issued its Biological Opinion (September 10, 1992) stating that the Project is not likely to jeopardize the continued existence of the desert tortoise or the desert pupfish, and imposing a range of mitigation measures designed to protect these species. After critical habitat was proposed for the desert tortoise in 1993, the BLM conferred with the USFWS, and the USFWS confirmed its "no jeopardy" opinion (September 20, 1993).

Additional biological surveys were carried out in 1996 in connection with the new EIS/EIR and the USFWS reviewed the updated information and stated that "new survey information of desert tortoise in new areas in the Project vicinity and the recent designation of critical habitat shall be investigated, but at present the Service sees no need to re-initiate consultation pursuant to section 7 of the Act." The USFWS's Section 7 Biological Opinion (9/10/92), Section 7 Conference (9/20/93) and 1996 Memorandum (9/30/96) are included in Exhibits D-1, D-2 and D-3, respectively.

The railroad which has been operating for over 40 years as part of the previous mining operations at the Project site has the potential for killing or injuring tortoises and fragmenting their habitat. The mitigation measures are designed to reduce or eliminate that potential by requiring inspection of the railroad line before each train trip to remove tortoise which might be in harm's way and by enabling the tortoises to pass under the rail line by development of culverts beneath the line and over the line by placement of ballast between the rails. A monitoring program implemented for the life of the

Project will be instituted to determine the effectiveness of the mitigation and to help locate future culverts and ballast locations.

The issue of the landfill attracting ravens to the area and raven predation of tortoise was a major concern of biologists and other interested parties. A raven monitoring program, including a minimum of two years of preparation monitoring, will be developed and enacted in conformance with BLM methodologies. Monitoring of ravens will continue throughout the life of the landfill Project or until the BLM, USFWS, and CDFG determine it is no longer necessary. Examples of mitigation measures include minimum of six inches of soil cover placed over deposited refuses on a daily basis to minimize attracting ravens and other predators to refuse. The perimeter of the active landfill and waste handling areas will be fenced to exclude predators such as coyotes and kit foxes. A nonlethal raven control program will be conducted including hazing at the landfill site, prompt removal of road-killed animals along access roads, and the possible use of bird repellant methyl anthranilate. If necessary, and subject to the approval of the BLM, USFWS and CDFG, a raven control program will be implemented that may include nest destruction, shooting and/or alterations of landfill operations.

The landfill operator will be required to purchase 400 acres of tortoise habitat selected by the BLM, NPS and CDFG, and transfer ownership of the habitat to the BLM, as mitigation for the loss of 160 acres of habitat. All such compensation acreage will be within the Chuckwalla Bench ACEC.

A portion of the railroad serving the Project is located in the vicinity of Salt Creek, the habitat of the desert pupfish, a federally listed endangered species. In addition to other mitigation measures designed to protect the pupfish and its habitat, after 36 months from the commencement of operations, the landfill operator will contribute the sum of $45,000 to the University of California to construct a pool to accommodate a population of Salt Creek pupfish at the Deep Canyon Reserve. This effort will help provide information on this species that could contribute to its conservation. In addition all requirements specified in a stream bed alteration agreement with CDFG relating to desert pupfish must also be implemented. All weed abatement in the area of the pupfish habitat will be done by hand instead of chemically. The roadbed and trestle through the habitat shall also be treated to prevent pollutants from escaping from the roadbed and trestle and possibly polluting the habitat. Prior to each passage of a locomotive engine over the Eagle Mountain Railroad, the fuel and lubricant holding tanks must be inspected; all leaks will be repaired prior to passage over Salt Creek; and a log of all such inspections will be kept and provided to the BLM or the USFWS upon request. CDFG and USFWS must immediately be notified in the event of any accident, and the results of any restoration or restocking efforts must be periodically reported to those agencies.

Implementation of the required mitigation measures will result in the avoidance or substantial reduction of the environmental impacts to desert tortoise and desert pupfish. Details of these

mitigation measures are set forth in Exhibit C (Mitigation and Monitoring Program) and Exhibit D (Biological Opinion, U.S. Fish & Wildlife Service). Given the mitigation measures and monitoring measures, I have determined that all practical measures have been taken to avoid or reduce adverse impacts to the desert tortoise and the desert pupfish.

4.7 Impact to Other Biological Resources: The EIS/EIR identified other important wildlife and plant species that occur on Federal and private land within the Project areas. These species have been observed or detected by sign at the landfill site or along the associated roads and railroad right-of-way. Wildlife species include ringtail, American badger, northern harrier, LeConte's thrasher, yellow warbler, yellow-breasted chat, and black-tailed gnatcatcher. No listed State or Federal plant species were observed within the Project boundaries. The CDFG and several commenters expressed concern about Alverson's Foxtail Cactus, California Barrel Cactus. California Leaf-Nosed Bat and Townsend's Big-Eared Bat, Nelson's bighorn sheep, and mountain lion.

A detailed description of these biological resources is set forth in the Draft EIS/EIR and the Biological Assessment completed in March 1992. Mitigation and monitoring measures have been designed to address concerns for these and other biological resources and include such conditions as the placement of four new, permanent water sources for bighorn sheep, preserving approximately 644 acre buffer zone for bighorn sheep habitat, and opening an existing adit to create a potential alternative winter

roost site for the California leaf-nosed bat. For the Alverson's foxtail cactus, a transplanting experiment indicated 100 percent survival of transplanted cactus and additional mitigation include the collection of seed. Transplanting of California Barrel Cactus will occur as well as the collection of seed. These are examples of a few of the mitigation and monitoring measures which are required for addressing other biological resources potentially affected by the Project.

Given the mitigation and monitoring measures, I have determined that potential impacts to other biological resources have been reduced to an acceptable level.

4.8 Biodiversity and Ecosystem Function. Some commenters, including the NPS/JTNP. expressed concern about the potential impacts of the Project on the desert ecosystem and its biodiversity. The EIS/EIR addresses the potential impacts to biodiversity and ecosystem function associated with the Project, including potential habitat loss, additional nutrients originating directly or indirectly from landfill material (defined as "eutrophication" by NPS), the introduction of exotic species, nitrate deposition and global warming. The mitigation measures identified throughout the EIS/EIR after consultation with the appropriate resource agencies address potential impacts to a broad range of plants and animals that occur in the Project area. Various control measures will be implemented within and around the. landfill and the Townsite. In addition, the funds deposited into and administered by the Environmental Mitigation Trust

will be used for, among other things, the acquisition of habitat and long-term monitoring of the areas and ecosystem surrounding the Project site. Given the mitigation and monitoring measures, I have determined that the potential impacts to biodiversity and ecosystem function after mitigation will be reduced to an acceptable level.

4.9 Impact to Groundwater Quality. Some commenters expressed concern about the potential for leachate (water or other liquid that comes into contact with waste) and landfill gas to contaminate the groundwater. The EIS/EIR analyzed the Project design. The liner system will act as a barrier to prevent the migration of landfill gas. Additionally, an active landfill gas collection and recovery system will be installed within the landfill, and the vadose zone monitoring system will include a gas monitoring system.

I have determined that after implementation of the mitigation and monitoring measures, all practical means have, been taken to avoid or reduce the potential for impact to water quality.

4.10 Impact to Groundwater Use. Several commenters were concern that the Project would result in overdraft of the groundwater. The EIS/EIR evaluated maximum groundwater use by the landfill and the townsite as 1243 ac-ft/yr. The groundwater recharge is estimated to be approximately 12,200 ac-ft/yr. The Project will not result in overdrafting the groundwater.

4.11 Impact of Seismic Activity. The affect of seismic activity on the landfill and liner system was a concern of commenters. The liner system is designed to meet or exceed state and federal seismic design requirements. Although the Project site is east and outside the areas of high historical seismicity in Southern California, the landfill liner system will be designed to withstand shaking from large earthquake events (an earthquake equivalent to an 8.0 quake on the San Andreas fault, which is approximately 32 miles from the Project site). The EIS/EIR evaluated the performance of existing landfills with and without composite liner systems in the California coastal zones that are subject to seismic activity, including impacts from the 1994 Northridge (Los Angeles) earthquake. Based on the Project's liner system, which meets or exceeds state and federal requirements in all respects, the absence of active faulting at or near the landfill and evaluation of landfills with and without liners after seismic events, I have determined that the impact from seismic activity would be minimal.

4.12 Impact to Air Quality. An important concern of the public and the NPS/JTNP was the potential air quality impacts from the Project. A number of potential sources of air quality impacts that could result from the Project were analyzed in the EIS/EIR, including combined emissions from landfill gas flaring; emissions from internal combustion engines in equipment utilized in landfill construction and landfill operation; fugitive dust created from landfill construction and landfill operation; and emissions from tracks and trains during transport of solid waste to the landfill.

The mitigation measures required to be implemented include: compliance with state and federal on- and off-road vehicle emission regulations; preferential use of "clean fuel" as appropriate; preferential use of low- or zero-emission vehicles; active dust suppression; evaluation of the effectiveness of the dust suppression program; selective vehicle/equipment shutdowns; and Best Available Control Technology for landfill gas recovery.

The Project will result in lower emission levels in the South Coast Air Basin at the expense of the desert areas. After implementation of all the mitigation measures, and while the EIS/EIR states that a number of the potential impacts from sources would be below the level of significance, the Project's potential air quality impacts, on the whole, will remain adverse.

Pursuant to Section 176(c) of the Clean Air Act, Federal agencies cannot support, permit or approve any activity which does not conform to an applicable state implementation plan (SIP). The Federal action of a land exchange is not subject to Section 176. The EPA has determined that transfers of ownership, interests, and titles in land, regardless of the form or method of the transfer, are categorically exempt from the conformity requirements (40 C.F.R.§51.853(c)(2)(xiv)). The Federal action of right-of-way authorizations is also exempt, because the direct and indirect emissions associated with the subject rights-of-way are demonstrably below specified de minimis levels.

Given the mitigation measures required for the Proposed Action, I have determined that the project's air quality impacts although adverse have been reduced to an acceptable level.

4.13 Procedural, Legal and Administrative Concerns: There were administrative issues related to the proposed exchange of lands with Kaiser that required further analysis and clarification:

4.13.1 Updated Appraisal. An independent appraisal of the non-Federal and Federal lands was previously performed for the land exchange and approved by the BLM on July 10, 1993. In accordance with the requirements of FLPMA and regulations thereunder, including 43 C.F.R. § 2201.3-4, the BLM has obtained an independent updated appraisal ("Appraisal") of the exchange lands, including the Federal lands, the non-Federal lands, and the interest of the United States in the patented lands conveyed to Kaiser in 195S pursuant to Private Law 790. The Appraisal was reviewed and approved by the BLM's Chief State Appraiser on April 28, 1997. The valuation date of the Appraisal is September 25, 1996, and the Chief State Appraiser has determined, that the appraisal will be valid until market conditions show any significant change.

The Appraisal was prepared by David J. Yerke, Inc. in accordance with the standards set forth in 43 C.F.R. §§ 2201.3-1 through 2201.3-4 and, to the extent appropriate, with the *Uniform Appraisal Standards for Federal Land Acquisitions.* The Appraisal, including the Chief State Appraiser's

written review report, is included in the administrative record.

At the time of the issuance of the Final EIS/EIR, the Appraisal had been submitted to but not yet reviewed and approved by the BLM. The Final EIS/EIR contained a summary of the appraisal report which was submitted to BLM, including a disclosure that the appraisal report was considered preliminary until reviewed and approved by the BLM. The appraisal report, as summarized in the EIS/EIR, was subsequently approved by the BLM.

As stated in the Appraisal, the market search area included over 3,600 square miles of remote mountainous and desert lands within eastern Riverside County, with a sales history of approximately 120 transactions dating back to January, 1993. The sales comparison analysis was narrowed to 16 sales occurring since January, 1995 based on overall compatibility with the subject lands. The Appraisal indicates that market values in the area have declined since 1990 and are currently at substantially lower levels than comparable sales used in the July, 1993 appraisal report.

Federal Lands. The Federal lands consist of approximately 3,481 acres of lands within and around the Project site administered by the BLM, including Federal lands subject to mining and mill site claims held by Kaiser. The fair market value of the Federal lands (excluding the PL 790 patented lands discussed below) was determined to be $268,000, or an average of approximately $77 per acre, using the sales comparison appraisal approach,

and based on the acreage of mountainous lands and level desert lands within the selected Federal lands.

PL 790 Lands and U.S. Interest. The PL 790 patented lands consist of 460.63 acres within and around the townsite area, which were patented by the BLM to Kaiser in 1955 pursuant to PL 790 (commonly referred to as the "Campsite Patent"). Although PL 790 indicates a total acreage of approximately 465 acres for these lands, which is the acreage figure noted in the Draft EIS/EIR, survey records indicate a total acreage of 460.63, which is the figure used by the Appraisal. The Campsite Patent contains a reversionary interest in the United States in the event that the property is not used for a continuous period of 7 years as a camp site, mill site or for other purposes incidental to mining. The interest of the United States in these lands will be conveyed to Kaiser as part of the land exchange.

Accordingly, the United States' interest in these 460.63 acres — but not the fee interest, which Kaiser already owns — must be given a value as part of the appraisal of the Federal lands. Although the nature of the United States' interest is actually less than a full fee interest, the BLM determined that, for purposes of appraising the value of this interest, the appraiser should value the interest as unimproved patented lands in fee (exclusive of improvements), not merely as a reversionary interest. This conservative methodology would favor the United States by increasing the compensation that BLM would receive from Kaiser in exchange for these property rights.

The fair market value of the PL 790 Patented Lands in fee, as raw lands without any Kaiser-owned improvements, was determined to be $49,000, or an average of approximately $106.38 per acre, using the sales comparison appraisal approach, and based on the acreage of mountainous lands and level desert lands within the PL 790 Patented Lands.

Non-Federal (Kaiser) Lands. The non-Federal lands consist of seven noncontiguous parcels owned by Kaiser along the Eagle Mountain Rail Line, comprising a total of approximately 2,846 acres. The fair market value of the non-Federal lands was determined to be $296,900 or an average of $104.32/AC, using the sales comparison appraisal approach and based on the acreage of mountainous lands and level desert lands within the offered non-Federal lands.

Thus, the total appraised value of the Federal lands and the interest of the United States in the PL 790 lands has been determined to be $317,000, and the appraised value of the non-Federal lands has been determined to be $296,900, leaving a difference of $20,100 in favor of the BLM. All reasonable efforts have been made to equalize values by adding or excluding lands; the Federal lands being transferred to Kaiser include all BLM-administered lands, and interests in BLM-administered lands, within and contiguous to the Project site, and the non-Federal lands being transferred by Kaiser to the BLM include all of Kaiser's land holdings within environmentally sensitive areas. Therefore, the BLM has determined that a cash equalization payment from Kaiser to the

BLM in the amount of $20,100 is appropriate, pursuant to 43 C.F.R. § 2201.6.

4.13.2 Status of the PL 790 Patented Lands and Rights-of-Way. Some members of the Federal contended that the reversionary interests included in the PL 790 patent and existing PL 790 railroad right-of-way along Kaiser's Eagle Mountain Railroad have been triggered and, therefore, that Kaiser is currently trespassing on Federal lands. It is BLM's determination that the reversionary interests of the United States have not been triggered, and, further, that Kaiser is not in trespass on Federal lands.

Pursuant to Private Law 790, in 1955 the BLM issued a patent to Kaiser Steel which covered approximately 460.63 acres in and around the Townsite (sometimes referred to as the "Campsite Patent"). The Campsite Patent conveyed this property to Kaiser Steel (and is now held by Kaiser Eagle Mountain, Inc.), subject to reversion to the United States in the event the property is not used for a continuous period of seven years as a camp site or mill site or for other incidental purposes in connection with Kaiser's mining operations. Similarly, the existing right-of-way for Kaiser's railroad (also granted pursuant to PL 790) is subject to a reversion to the United States in the event the right-of-way is abandoned or is not used for a continuous period of seven years.

In view of the fact that Kaiser received full and complete title to the surface estate, subject only to the possibility of the reverter, BLM has determined

that Kaiser's lease of a portion of the patented property for the operation of a return-to-custody facility is within the rights granted to Kaiser under the patent. The facility has been operating at Eagle Mountain since 1986 under a lease agreement from Kaiser and a County Federal use permit. Kaiser received full possessory interest in the surface of the property and had the right to utilize that surface according to its discretion subject only to the conditions of the reverter clause and the planning and zoning rules and regulations of the local jurisdiction, which is the County of Riverside.

The reversionary interest of the United States in the approximately 461 acres patented to Kaiser in 1955 under PL 790 is discussed in the Draft EIS/EIR ("Reversionary Interest in Townsite Area and Rights-of-Way") and in a Department of Interior Regional Solicitor's Opinion contained in Appendix O. As stated in the Opinion, "The surface estate will not revert to the United States automatically, but would only revert upon the election of the Secretary [of Interior], based upon a finding that the facts support the applicability of the reversionary clause...." The BLM has determined that the reversionary interest under PL 790 has not been triggered. Furthermore, as noted in the Regional Solicitor's Opinion, control of the reversion rests with Kaiser because Kaiser can prevent the reversion by using the property for mining-related purposes. Thus, if the Project does not go forward, the campsite and the railroad right-of-way (i.e., the lands on which the United States retains a reversionary interest) could remain in Kaiser's ownership. As a result, these lands would

not necessarily revert to the United States if the Project does not go forward.

Although Kaiser has ceased full-time mining operations at the Kaiser Mine, Kaiser has continued to make shipments of ore and other materials (e.g., aggregate and riprap) and has engaged in other activities incidental to mining at the site, such as the maintenance of equipment and roads, sand and gravel sales, administration and annual assessment work in connection with the maintenance of Kaiser's mining claims and other mining-relating activities. A shipment of iron ore was made over the railroad in March of 1993. The BLM has determined that the existing right-of- way has not reverted, and that the new FLPMA rights-of-way should be granted regardless of the status of the existing right-of-way.

The BLM has the authority to transfer the United States' interest in the PL 790 lands to Kaiser under FLPMA. The BLM's interest in the PL 790 lands is an "interest" in lands under 43 C.F.R. § 2200.0-5(i) and, therefore, the BLM has authority to dispose of its interest as part of the land exchange with Kaiser.

4.13.3 Eagle Crest Energy Company Hydroelectric Facility Proposal. On January 31, 1991, the Eagle Mountain Energy Company (now Eagle Crest Energy Company, or "ECEC") filed an application for a preliminary permit for a pumped storage hydroelectric Project at the Eagle Mountain mine site with the Federal Energy Regulatory Commission ("FERC"). ECEC and the FERC took the position that the Federal lands included within their

Project were automatically reserved under the Federal Power Act from disposition, effective upon the filing of their application with the FERC. On March 22, 1995, the FERC vacated the Section 24 reservation on all Federal lands other than those within ECEC's license application boundaries.

In February 1996, Kaiser filed with the BLM an Application for No Injury Determination pursuant to 16 U.S.C. § 818 (Section 24 of the Federal Power Act) and 18 C.F.R. § 25.1, relating to the BLM-administered parcels that are both within the boundaries of ECEC's proposed hydropower facility and within the boundaries of the proposed Project and land exchange (FERC-reserved BLM parcels). Section 24 of the FPA authorizes the BLM to conditionally transfer any BLM- administered lands which have been reserved by the FERC for power purposes, provided that the FERC determines that the value of such lands as power sites will not be injured or destroyed for future power development by such conditional transfer. The condition on the transfer would be in the form of a reservation in the transferring patent reserving the rights of the United States and its licensees for power purposes.

On April 30, 1996, the BLM submitted to the FERC a formal request for No Injury Determination Under Federal Power Act Section 24. On June 7, 1996, FERC granted the BLM's request, stating that the power value of the affected Federal lands would not be injured or destroyed for purposes of power development if conveyed to the Kaiser by BLM. Accordingly, the patent to these lands will contain a reservation for power purposes under Section 24 of

the Federal Power Act if required by the FERC at the time of the consummation of the land exchange.

4.14 Concerns Regarding Hazardous Materials: Federal concern was expressed about the possibility of hazardous materials being transported to the landfill site or the potential for the prior existence of hazardous material occurring on either the Federal or non-Federal lands due to past activities.

The Project provides for only the development of a Class III nonhazardous solid waste landfill, and waste delivered to the landfill site will only be accepted from solid waste facilities serving jurisdictions in compliance with Assembly Bill 939, the California Integrated Solid Waste Management Act of 1989, as well as any successive implementing legislation and any applicable Federal or State waste diversion legislation. Class I hazardous wastes will be diverted from the waste stream to disposal areas designed to accept them, all of which are presently located outside of Riverside County. In addition, certain liquid wastes, white goods (e.g., appliances), sewage and water treatment sludge, incinerator ash, infectious wastes, and radioactive wastes will be diverted from the waste stream and sent to disposal areas designed and approved to accept them.

Regarding the potential for the prior existence of hazardous material occurring on the lands to be exchanged, in 1992 a contaminant survey of the Federal land and the non-Federal land was conducted in accordance with Section 120(h) of the Comprehensive Environmental Recovery and

Liability Act (CERCLA). In 1996, BLM conducted three additional Level I surveys on the non-Federal lands, the Federal lands and the PL 790 Townsite area lands, respectively. There was no evidence or recorded information found to indicate that any hazardous substance was stored, disposed of, or released on any of these lands.

In 1994, the California Department of Toxic Substances Control ("DTSC") conducted an inspection of the Project site in response to certain citizen allegations. The DTSC's Complaint Inspection and Sampling Report stated that no evidence was found to support the allegations that hazardous waste was disposed at the Project site in sufficient quantities or with toxic characteristics so as to noticeably impact the environment or to warrant a formal enforcement action. Subsequently, in 1994 the DTSC issued an Addendum Report reaffirming the conclusions of the earlier Report.

The U.S. Environmental Protection Agency ("EPA") issued its own report in 1994, after undertaking a Federal Facility Preliminary Assessment review of the site under CERCLA to determine whether the site should be placed on the EPA's National Priorities List ("NPL"). EPA stated that the Preliminary Assessment requirements had been met for the site, and no further action by EPA was warranted at that time.

To the best of our knowledge, no hazardous materials were used in conjunction with iron ore recovery at the mine on the Federal lands. Hazardous materials may occur on the Federal lands. If any time

after the conveyance of the selected lands, any condition on the land is found to be in violation of any Federal, State or local laws or regulations. Kaiser or its successors shall be responsible to immediately take all actions necessary to abate any such violation, and perform all activities required to remediate the site consistent with all applicable laws and regulations, irrespective of whether or not Kaiser or its successors caused, contributed to, or had actual knowledge of the activities or conditions causing the violations. Further, Kaiser and its successors will hold the United States harmless from any liability and expense resulting from such condition or activities.

4.15 Irreversible and Irretrievable Commitments of Resources. With respect to this Project, there are irreversible and irretrievable commitments of resources that must be acknowledged. The size and life of the Project represents a large commitment. Over 2,000 acres will be directly affected by the Project. Nearby lands owned by Kaiser or in proximity to the Eagle Mountain community will be indirectly affected. The potential lifetime for the landfill is 100 ears which is beyond the scope of an average Federal works Project. After formal closure of the landfill, maintenance and monitoring and post-closure activities will continue.

The most significant irreversible impact, as in other land development Projects, relates to the land on which the Project is actually located. The land in question for the Eagle Mountain Landfill, however, has already been subject to very severe disturbance

from over 40 years of mining activities. The irreversible change in the land has already taken place, and the Project involves a beneficial use and ultimate restoration of the disturbed land. The development of a landfill at a previously disturbed site, such as Eagle Mountain, avoids significant adverse impacts of locating a landfill in an area not previously disturbed.

It is my determination that the irreversible and irretrievable commitment of resources associated with the Eagle Mountain Landfill Project is not sufficient to warrant disapproval of the land exchange or rights-of-way or the selection another alternative.

4.16 Cumulative Impacts. Cumulative impacts depend on the future uses of the area, such as possible increased agricultural activity, JTNP Projects and improvements, other regional landfills in the Southern California region, or the construction of Eagle Crest Energy Company's ("ECEC's") proposed hydroelectric Project (see Section 4.13.3 above). There are no other known proposed Projects within 30 miles of the Project site. The EIS/EIR determined that increased air emissions in both the South Coast Air Basin and the Southeast Desert Air Basin would be the most significant cumulative effect resulting from the proposed Project and other Projects of a regional nature. In addition, the EIS/EIR determined that increased regional water consumption from either an increase of agricultural activity to historically high levels and/or development of the ECEC proposal to operate a pumped storage

hydroelectric Project would be a significant cumulative impact.

The EIS/EIR concluded that the potential cumulative impacts that would be considered significant after mitigation are air quality (because the Project is located within an existing nonattainment basin) and groundwater use.

4.17 Environmental Justice. President Clinton signed Executive Order 12898 on February 11, 1994 to address environmental justice in federal programs, policies, and activities. Secretary Babbitt issued an environmental justice policy for the Department of the Interior on August 17, 1994, in support of Executive Order 12898. Environmental justice means the prevention of disproportionately high and adverse human health or environmental impacts on minority or low- income populations.

The land exchange and right-of-way grants are consistent with Executive Order 12898 and the Department of the Interior's policy on environmental justice. No disproportionate adverse impacts on human health are expected for minority or low-income populations.

4.18 Native American Consultation. The chairpersons from Fort Mojave Indian Reservation, Chemehuevi Indian Reservation, Colorado River Indian Reservation, Twentynine Palms Indian Reservation, Morongo Indian Reservation, Aqua Caliente Indian Reservation, Cabazon Indian Reservation and Torres-Martinez Indian Reservation were contacted in January, 1990. It was determined

that Morongo Indian Reservation, Aqua Caliente Indian Reservation and Cabazon Indian Reservation, Fort Mojave Indian Reservation and Chemehuevi Indian Reservation did not wish to visit the area or make any statement with respect to the Project. At the February site visit, two Mojaves from the Colorado River Indian Tribes and a Cahuilla elder from Torres Martinez Indian Reservation were present. Their concern focused on possibility of inadvertent dumping of hazardous materials.

5.0 MITIGATION AND MONITORING. It is my determination that all practicable means to avoid or reduce environmental harm have been adopted. A comprehensive Mitigation Monitoring and Reporting Program has been adopted for the Project and is included herein as Exhibit "C." As part of the overall mitigation and monitoring program, the special measures have been incorporated and described below:

5.1 Environmental Mitigation Trust. This measure, which was not related to the Federal action but referenced in the FWS Biological Opinion, assists the desert communities of eastern Riverside County in meeting the biodiversity challenge by providing an additional source of funding for acquisition of sensitive plant and animal habitat and open space and for conducting long-term monitoring and other environmental research activities. Specifically, it provides for an Environmental Mitigation Trust to administer the contribution of $1.00 per ton of waste deposited at the landfill. The Environmental Mitigation Trust, administered by the Riverside County Board of Supervisors, will acquire, restore,

maintain and preserve open space lands, interests in lands, water or water rights, wildlife habitats, and provide public access to such lands. The Trust will also support research and education concerning conservation of natural resources and monitor the long term effects of the Project on the desert ecosystem. Of the funds deposited into the Trust, 72% of the funds will be used primarily to acquire lands that provide high quality habitat for special status species in the region. In addition, 18% of the funds will be used for long-term monitoring, research and mitigation. The remaining 10% of the funds will be used to acquire privately held parcels located in JTNP and for long term research, monitoring and mitigation associated with potential unforeseen future impacts of the Project to JTNP.

5.2 Citizens Oversight Committee. A Citizens Oversight Committee will be established by the County to oversee implementation of the landfill. The Committee is designed to function as a "watchdog" to provide an added safety check regarding conditions imposed on the Project. Meetings will be scheduled as needed to review status reports, technical data and reports on the landfill issued by all agencies having regulatory authority over the Project. Although the BLM would not be directly involved as a member of the Citizens Oversight Committee, it is reasonably foreseen that the BLM will be concerned with pertinent issues, reports or data involving Federal land management in the area of the Project. The Citizens Oversight Committee will prepare an annual report summarizing its findings and will make inquiries or

file such reports with other regulatory agencies as it deems appropriate.

5.3 NPS and Kaiser/MRC Agreement. NPS and Kaiser/MRC signed an agreement (December 12, 1996) whose purpose is to assure NPS that the Project will consider the purpose and values of the Park and not result in derogation of the value and purposes of the Park; it was an independently initiated between NPS and Kaiser/MRC. It was not required by the BLM nor a part of the Federal action. According to the agreement it "provides for additional obligations and responsibilities of Kaiser/MRC regarding resource issues and unforeseeable impacts and implementing addition mitigation. The agreement also address research and financial assurances.

6.0 PUBLIC INVOLVEMENT.

The NEPA process to identify the scope and content of the Draft EIS/EIR was initiated by a Notice of Intent published May 11, 1995 (60 Fed. Reg. 25243) and Correction to Notice of Intent published June 14, 1995 (60 Fed. Reg. 31321). Approximately 800 agencies, organizations, and individuals were sent copies of the NOI (and/or the Notice of Preparation under CEQA) prepared by the BLM and the County, respectively. A Notice of Exchange Proposal was also published May 12, May 19, May 26 and June 2, 1995 in the Riverside Press Enterprise and the Desert Sun, two local newspapers of general circulation.

Four public scoping meetings were held by the BLM and the County over a 2-day period to solicit public and agency comments for consideration in the Draft EIS/EIR. Scoping meetings were held in Palm Desert and Desert Center on May 31, 1995, and in Riverside and Hemet on June 1, 1995.

In addition to the public scoping meetings, a series of individual agency scoping meetings were held from February through August 1995. Participating state agencies were the California Integrated Waste Management Board, State Water Resources Control Board, California Department of Fish and Game, South Coast Air Quality Management District, and the California Air Resources Board. The Federal agencies were the National Park Service, the Biological Resources Division of the U.S. Geological Survey (formerly the National Biological Service), the Environmental Protection Agency, and U.S. Fish and Wildlife Service. Local agencies included the County of Riverside departments.

Separate scoping meetings were also held with litigants in two of the three legal challenges in the previous State Court proceedings (and who were also parties to the IBLA appeals to the 1993 ROD), Eagle Crest Energy Company and Laurence and Donna Charpied. Members of the third litigant group, the National Parks and Conservation Association and others, either sent written comments, commented in public scoping sessions, declined to meet, or did not respond to requests to meet.

Approximately 350 copies of the Draft EIS/EIR were distributed for public review and the comment period closed September 17, 1996, providing a 67-day review period. During the public review period the BLM conducted four additional public hearings on the following dates and locations: (1) August 5, 1996, Lake Tamarisk Clubhouse, Desert Center, CA; (2) August 6, 1996, Palm Springs Convention Center, Palm Springs, CA; (3) August 7, 1996, Blackrock Visitor Center, JTNP, Yucca Valley, CA; and (4) August 8, 1996, Riverside Municipal Auditorium, Riverside, CA. The hearings were conducted by a BLM Hearings Officer. During the 67-day public review period on the Draft EIS/EIR, approximately 250 letters of comment were received.

The Notice of Availability on the Final EIS/EIR was published by the EPA on January 23, 1997, beginning the 30-day public review period which ended on February 24, 1997. Approximately 375 copies of the Final EIS/EIR were distributed to individuals, groups and agencies.

Thereafter, the County of Riverside Planning Commission held six public hearings in various locations throughout the County to gather public input related to the Project, and on May 7, 1997 adopted a Resolution and Findings recommending that the Board of Supervisors certify the EIR and approve the Project. After five public hearings the Riverside County Board of Supervisors voted September 9, 1997 to approve the Project.

APPENDIX F
Ninth Circuit Order on Rehearing

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL PARKS & CONSERVATION ASSOCIATION, Plaintiff - Appellee, v. BUREAU OF LAND MANAGEMENT; UNITED STATES DEPARTMENT OF INTERIOR, Defendants, and KAISER EAGLE MOUNTAIN, INC.; MINE RECLAMATION CORPORATION, Defendants - Appellants.	No. 05-56814 D.C. No. CV-00-00041-RT Central District of California, Riverside ORDER

DONNA CHARPIED; LAURENCE CHARPIED; DESERT PROTECTION SOCIETY; CENTER FOR COMMUNITY ACTION AND ENVIRONMENTAL JUSTICE, Plaintiffs - Appellees, v. UNITED STATES DEPARTMENT OF INTERIOR, Defendant,	No. 05-56815 D.C. No. CV-99-00454-RT Central District of California, Riverside

BUREAU OF LAND MANAGEMENT; NATIONAL PARK SERVICE; BRUCE BABBITT, in his official capacity as Secretary of the Interior; TOM FRY, in his official capacity as Acting Director of the Bureau of Land Management; AL WRIGHT, in his official capacity as Acting California State Director of the Bureau of Land Management; TIM SALT, in his official capacity as Bureau of Land Management California Desert District Manager; ROBERT STANTON, in his official capacity as Director of the National Park Service,

Defendants,

and

KAISER EAGLE MOUNTAIN, INC.; MINE RECLAMATION CORPORATION,

Defendants - Appellants.

NATIONAL PARKS & CONSERVATION ASSOCIATION,

Plaintiff - Appellee,

v.

UNITED STATES DEPARTMENT OF INTERIOR,

Defendant - Appellant,

BUREAU OF LAND MANAGEMENT,

Defendant - Appellant,

No. 05-56832

D.C. No. CV-00-00041-RT
Central District of California,
Riverside

and

KAISER EAGLE MOUNTAIN, INC.; MINE RECLAMATION CORPORATION,

Defendants.

DONNA CHARPIED; LAURENCE CHARPIED; DESERT PROTECTION SOCIETY; CENTER FOR COMMUNITY ACTION AND ENVIRONMENTAL JUSTICE,

Plaintiffs - Appellees,

v.

UNITED STATES DEPARTMENT OF INTERIOR,

Defendant - Appellant,

BUREAU OF LAND MANAGEMENT; NATIONAL PARK SERVICE; BRUCE BABBITT, in his official capacity as Secretary of the Interior; TOM FRY, in his official capacity as Acting Director of the Bureau of Land Management; AL WRIGHT, in his official capacity as Acting California State Director of the Bureau of Land Management; TIM SALT, in his official capacity as Bureau of Land Management California Desert District Manager; ROBERT STANTON, in his official capacity as Director of the National Park Service,

Defendants - Appellants,

and

No. 05-56843

D.C. No. CV-99-00454-RT
Central District of California,
Riverside

KAISER EAGLE MOUNTAIN, INC.; MINE RECLAMATION CORPORATION,

Defendants.

DONNA CHARPIED; LAURENCE CHARPIED; DESERT PROTECTION SOCIETY; CENTER FOR COMMUNITY ACTION AND ENVIRONMENTAL JUSTICE,

Plaintiffs - Appellants,

v.

UNITED STATES DEPARTMENT OF INTERIOR; KAISER EAGLE MOUNTAIN, INC.; MINE RECLAMATION CORPORATION; BUREAU OF LAND MANAGEMENT; NATIONAL PARK SERVICE; BRUCE BABBITT, in his official capacity as Secretary of the Interior; TOM FRY, in his official capacity as Acting Director of the Bureau of Land Management; AL WRIGHT, in his official capacity as Acting California State Director of the Bureau of Land Management; TIM SALT, in his official capacity as Bureau of Land Management California Desert District Manager; ROBERT STANTON, in his official capacity as Director of the National Park Service,

Defendants - Appellees.

No. 05-56908

D.C. No. CV-99-00454-RT
Central District of California,
Riverside

Before: PREGERSON, TROTT and PAEZ, Circuit Judges.

The full court was advised of the petitions for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

All petitions for rehearing and rehearing en banc are DENIED

APPENDIX G
Statutes and Regulations

5 U.S.C. § 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

42 U.S.C. § 4332(2)(C)

all agencies of the Federal Government shall—

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

42 U.S.C. § 4371 Congressional findings, declarations, and purposes

(a) The Congress finds--

(1) that man has caused changes in the environment;

(2) that many of these changes may affect the relationship between man and his environment; and

(3) that population increases and urban concentration contribute directly to pollution and the degradation of our environment.

(b) (1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water and land resources,

transportation, and economic and regional development.

(2) The primary responsibility for implementing this policy rests with State and local governments.

(3) The Federal Government encourages and supports implementation of this policy through appropriate regional organizations established under existing law.

(c) The purposes of this title [42 USCS §§ 4371 et seq.] are--

(1) to assure that each Federal department and agency conducting or supporting public works activities which affect the environment shall implement the policies established under existing law; and

(2) to authorize an Office of Environmental Quality, which, notwithstanding any other provision of law, shall provide the professional and administrative staff for the Council on Environmental Quality established by Public Law 91-190 [42 USCS §§ 4321 et seq.].

43 U.S.C. § 1716(a)-(b)

(a) Authorization and limitations on authority of Secretary of the Interior and Secretary of Agriculture. A tract of public land or interests therein may be disposed of by exchange by the Secretary under this Act and a tract of land or interests therein within the National Forest System may be disposed of by exchange by the Secretary of Agriculture under

applicable law where the Secretary concerned determines that the public interest will be well served by making that exchange: Provided, That when considering public interest the Secretary concerned shall give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife and the Secretary concerned finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired.

(b) Implementation requirements; cash equalization waiver. In exercising the exchange authority granted by subsection (a) or by section 205(a) of this Act [43 USCS § 1715(a)], the Secretary concerned may accept title to any non-Federal land or interests therein in exchange for such land, or interests therein which he finds proper for transfer out of Federal ownership and which are located in the same State as the non-Federal land or interest to be acquired. For the purposes of this subsection, unsurveyed school sections which, upon survey by the Secretary, would become State lands, shall be considered as "non-Federal lands". The values of the lands exchanged by the Secretary under this Act and by the Secretary of Agriculture under applicable law relating to lands within the National Forest System either shall be equal, or if they are not equal, the values shall be equalized by the payment of money to the grantor or to the Secretary concerned as the

circumstances require so long as payment does not exceed 25 per centum of the total value of the lands or interests transferred out of Federal ownership. The Secretary concerned and the other party or parties involved in the exchange may mutually agree to waive the requirement for the payment of money to equalize values where the Secretary concerned determines that the exchange will be expedited thereby and that the public interest will be better served by such a waiver of cash equalization payments and where the amount to be waived is no more than 3 per centum of the value of the lands being transferred out of Federal ownership or $ 15,000, whichever is less, except that the Secretary of Agriculture shall not agree to waive any such requirement for payment of money to the United States. The Secretary concerned shall try to reduce the amount of the payment of money to as small an amount as possible.

40 C.F.R. § 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

43 C.F.R. § 2200.0-5 Definitions.

As used in this part:

(a) Adjustment to relative values means compensation for exchange-related costs, or other

responsibilities or requirements assumed by one party, which ordinarily would be borne by the other party. These adjustments do not alter the agreed upon value of the lands involved in an exchange.

(b) Agreement to initiate means a written, nonbinding statement of present intent to initiate and pursue an exchange, which is signed by the parties and which may be amended by the written consent of the parties or terminated at any time upon written notice by any party.

(c) Appraisal or Appraisal report means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion as to the market value of the lands or interests in lands as of a specific date(s), supported by the presentation and analysis of relevant market information.

(d) Approximately equal value determination means a decision that the lands involved in an exchange have readily apparent and substantially similar elements of value, such as location, size, use, physical characteristics, and other amenities.

(e) Arbitration means a process to resolve a disagreement among the parties as to appraised value, performed by an arbitrator appointed by the Secretary from a list recommended by the American Arbitration Association.

(f) Assembled land exchange means the consolidation of multiple parcels of Federal and/or

non-Federal lands for purposes of one or more exchange transactions over a period of time.

(g) Authorized officer means any employee of the Bureau of Land Management who has been delegated the authority and responsibility to make decisions and perform the duties described in this part.

(h) Bargaining means a process, other than arbitration, by which parties attempt to resolve a dispute concerning the appraised value of the lands involved in an exchange.

(i) Federal lands means any lands or interests in lands, such as mineral or timber interests, that are owned by the United States and administered by the Secretary of the Interior through the Director of the Bureau of Land Management, without regard to how the United States acquired ownership, except: (1) Lands located on the Outer Continental Shelf; and (2) lands held for the benefit of Indians, Aleuts and Eskimos.

(j) Hazardous substances means those substances designated under Environmental Protection Agency regulations at 40 CFR part 302.

(k) Highest and best use means the most probable legal use of a property, based on market evidence as of the date of valuation, expressed in an appraiser's supported opinion.

(l) Lands means any land and/or interests in land.

(m) Ledger account means an accounting mechanism that tracks the differential in dollar value of lands conveyed throughout a series of transactions. A ledger reports each transaction by date, value of Federal land, value of non-Federal land, the difference between these values upon completion of each transaction, and a cumulative balance and differential.

(n) Market value means the most probable price in cash, or terms equivalent to cash, that lands or interests in lands should bring in a competitive and open market under all conditions requisite to a fair sale, where the buyer and seller each acts prudently and knowledgeably, and the price is not affected by undue influence.

(o) Mineral laws means the mining laws, mineral leasing laws, and the Geothermal Steam Act, but not the Materials Sales Act, administered by the Secretary of the Interior through the Bureau of Land Management.

(p) Outstanding interests means rights or interests in property held by an entity other than a party to an exchange.

(q) Party means the United States or any person, State or local government who enters into an agreement to initiate an exchange.

(r) Person means any individual, corporation, or other legal entity legally capable to hold title to and convey land. An individual must be a citizen of the United States and a corporation must be subject to

the laws of the United States or of the State where the land is located or the corporation is incorporated.

(s) Public land laws means that body of general land laws administered by the Secretary of the Interior through the Bureau of Land Management, excepting, however, the mineral laws.

(t) Reserved interest means an interest in real property retained by a party from a conveyance of the title to that property.

(u) Resource values means any of the various commodity values (e.g., timber or minerals) or non-commodity values (e.g., wildlife habitat or scenic vistas), indigenous to particular land areas, surface and subsurface.

(v) Secretary means the Secretary of the Interior or the individual to whom the authority and responsibilities of that official, as to matters considered in this part, have been delegated.

(w) Segregation means the removal for a limited period, subject to valid existing rights, of a specified area of the Federal lands from appropriation under the public land laws and mineral laws, pursuant to the authority of the Secretary of the Interior to allow for the orderly administration of the Federal lands.

(x) Statement of value means a written report prepared by a qualified appraiser that states the appraiser's conclusion(s) of value.

43 C.F.R. § 2200.0-6 Policy

(a) Discretionary nature of exchanges. The Secretary is not required to exchange any Federal lands. Land exchanges are discretionary, voluntary real estate transactions between the Federal and non-Federal parties. Unless and until the parties enter into a binding exchange agreement, any party may withdraw from and terminate an exchange proposal or an agreement to initiate an exchange at any time during the exchange process, without any obligation to reimburse, or incur any liability to, any party, person or other entity.

(b) Determination of public interest. The authorized officer may complete an exchange only after a determination is made that the public interest will be well served. When considering the public interest, the authorized officer shall give full consideration to the opportunity to achieve better management of Federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives, including but not limited to: Protection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values; enhancement of recreation opportunities and public access; consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient management and development; consolidation of split estates; expansion of communities; accommodation of land use authorizations; promotion of multiple-use values; and fulfillment of public needs. In making this determination, the authorized officer must find that:

(1) The resource values and the public objectives that the Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the resource values of the non-Federal lands or interests and the public objectives they could serve if acquired, and

(2) The intended use of the conveyed Federal lands will not, in the determination of the authorized officer, significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands. Such finding and the supporting rationale shall be made part of the administrative record.

(c) Equal value exchanges. Except as provided in § 2201.5 of this part, lands or interests to be exchanged shall be of equal value or equalized in accordance with the methods set forth in § 2201.6 of this part. An exchange of lands or interests shall be based on market value as determined by the Secretary through appraisal(s), through bargaining based on appraisal(s), or through arbitration.

(d) Same-State exchanges. The Federal and non-Federal lands involved in an exchange authorized pursuant to the Federal Land Policy and Management Act of 1976, as amended, shall be located within the same State.

(e) O and C land exchanges. Non-Federal lands acquired in exchange for revested Oregon and California Railroad Company Grant lands or reconveyed Coos Bay Wagon Road Grant lands are required to be located within any one of the 18

counties in which the original grants were made, and, upon acquisition by the United States, automatically shall assume the same status as the lands for which they were exchanged.

(f) Congressional designations. Upon acceptance of title by the United States, lands acquired by an exchange that are within the boundaries of any unit of the National Forest System, National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, National Trails System, National Wilderness Preservation System, or any other system established by Act of Congress; the California Desert Conservation Area; or any national conservation or national recreation area established by Act of Congress, immediately are reserved for and become part of the unit or area within which they are located, without further action by the Secretary, and thereafter shall be managed in accordance with all laws, rules, regulations, and land use plans applicable to such unit or area.

(g) Land and resource management planning. The authorized officer shall consider only those exchange proposals that are in conformance with land use plans or plan amendments, where applicable. Lands acquired by an exchange within a Bureau of Land Management district shall automatically become public lands as defined in 43 U.S.C. 1702 and shall become part of that district. The acquired lands shall be managed in accordance with existing regulations and provisions of applicable land use plans and plan amendments. Lands acquired by an exchange that are located within the boundaries of areas of critical environmental concern

or any other area having an administrative designation established through the land use planning process shall automatically become part of the unit or area within which they are located, without further action by the Bureau of Land Management, and shall be managed in accordance with all laws, rules, regulations, and land use plans applicable to such unit or area.

(h) Environmental analysis. After an agreement to initiate an exchange is signed, an environmental analysis shall be conducted by the authorized officer in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4371), the Council on Environmental Quality regulations (40 CFR parts 1500-1508), and the environmental policies and procedures of the Department of the Interior and the Bureau of Land Management. In making this analysis, the authorized officer shall consider timely written comments received in response to the published exchange notice, pursuant to § 2201.2 of this part.

(i) Reservations or restrictions in the public interest. In any exchange, the authorized officer shall reserve such rights or retain such interests as are needed to protect the public interest or shall otherwise restrict the use of Federal lands to be exchanged, as appropriate. The use or development of lands conveyed out of Federal ownership are subject to any restrictions imposed by the conveyance documents and all laws, regulations, and zoning authorities of State and local governing bodies.

(j) Hazardous substances -- (1) Federal lands. The authorized officer shall determine whether hazardous substances may be present on the Federal lands involved in an exchange and shall provide notice of known storage, release, or disposal of hazardous substances on the Federal lands to the other parties in accordance with the provisions of 40 CFR part 373. The authorized officer shall provide this notice in the exchange agreement. The authorized officer shall also provide such notice, to the extent information is readily available, in the agreement to initiate an exchange. Unless the non-Federal party is a potentially responsible party under 42 U.S.C. 9607(a), the conveyance document from the United States shall contain a covenant in accordance with 42 U.S.C. 9620(h)(3). Where the non-Federal party is a potentially responsible party with respect to the property, it may be appropriate to enter into an agreement, as referenced in 42 U.S.C. 9607(e), whereby that party would indemnify the United States and hold the United States harmless against any loss or cleanup costs after conveyance.

(2) Non-Federal lands. The non-Federal party shall notify the authorized officer of any known, suspected and/or reasonably ascertainable storage, release, or disposal of hazardous substances on the non-Federal land pursuant to § 2201.1 of this part. Notwithstanding such notice, the authorized officer shall determine whether hazardous substances are known to be present on the non-Federal land involved in an exchange. If hazardous substances are known or believed to be present on the non-Federal land, the authorized officer shall reach an agreement with the non-Federal party regarding the

responsibility for appropriate response action concerning the hazardous substances before completing the exchange. The terms of this agreement and any appropriate "hold harmless" agreement shall be included in an exchange agreement, pursuant to § 2201.7-2 of this part.

(k) Legal description of properties. All lands subject to an exchange shall be properly described on the basis of either a survey executed in accordance with the Public Land Survey System laws and standards of the United States or, if those laws and standards cannot be applied, the lands shall be properly described and clearly locatable by other means as may be prescribed or allowed by law.

(l) Unsurveyed school sections. For purposes of exchange only, unsurveyed school sections, which would become State lands upon survey by the Secretary, are considered as "non-Federal" lands and may be used by the State in an exchange with the United States. However, minerals shall not be reserved by the State when unsurveyed sections are used in an exchange. As a condition of the exchange, the State shall have waived, in writing, all rights to unsurveyed sections used in the exchange.

(m) Coordination with State and local governments. At least 60 days prior to the conveyance of and upon issuance of the deed or patent for Federal lands, the authorized officer will notify the Governor of the State within which the Federal lands covered by the notice are located and the head of the governing body of any political subdivision having zoning or other land use

regulatory authority in the geographical area within which the Federal lands are located.

(n) Fee coal exchanges. As part of the consideration of whether public interest would be served by the acquisition of fee coal through exchange, the provisions of subpart 3461 of this title shall be applied and shall be evaluated as a factor and basis for the exchange.

APPENDIX H

Declaration of Thomas Gey

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

DONNA CHARPIED, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	No. EDCV 99-0454 RT (MCx)
NATIONAL PARKS AND CONSERVATION ASSOCIATION, Plaintiff, v. BUREAU OF LAND MANAGEMENT, et al., Defendants.	No. EDCV 00-0041 RT (MCx)

DECLARATION OF THOMAS GEY

I, Thomas Gey, make the following declaration:

1. I, Thomas Gey, am employed by Bureau of Land Management as a Realty Specialist in the California Desert District Office in Riverside, California. I have been employed in this capacity from 1991 to the present. While serving as the lead Realty Specialist for land exchanges in the California Desert District Office I became familiar with the

exchange which is associated with the above-captioned matters. In this capacity, I retrieved and compiled the administrative record associated with the above-captioned matters.

2. To the best of my knowledge, the index attached to this declaration constitutes a true, correct, and complete index of the administrative record for the decisions of the Bureau of Land Management in these cases. To the best of my knowledge, the index identifies those documents considered directly or indirectly by the Bureau of Land Management in connection with the agency decisions.

3. To the best of my knowledge, and as noted on the attached one page errata listing, the documents provided to the parties prior to the briefing on the merits of these cases constitute a true, correct, and complete copy of the administrative record in this action. Each document is a true and correct copy of the original documents located in the files of Bureau of Land Management's California Desert District Office.

4. I further certify that the documents attached as exhibits to Defendants' October 7, 2002, Joint Memorandum In Opposition to Plaintiffs' Motions for Summary Judgement and in Support of Defendants' Joint Motions for Summary Judgement: *FLPMA ISSUES* and Defendants' January 13, 2003 Joint Reply Memorandum in Opposition to Plaintiffs' Motions for Summary Judgement and in Support of Defendants' Joint Motion for Summary Judgement: *FLPMA ISSUES*, are complete and accurate copies of

supplemental Administrative Record documents for the decisions of the Bureau of Land Management challenged in these cases. The supplemental Administrative Record documents include the following:

A. A report titled: *Eagle Mountain Exchange Valuation Issues* For Bureau of Land Management California State Office Sacramento, California, Effective Date September 25, 1997, By Steven J. Herzog, MAI, The Herzog Group, Inc. Filed as Exhibit A to the Declaration of Steven J. Herzog, MAI, in Support of Defendants Joint Motion for Summary Judgement (the Herzog Declaration is Docket Entry No. 79 in *Charpied et al. v. U.S. Department of the Interior, et al.*, Civ. No. EDCV 99-0454 RT (MCx).

B. A memorandum dated January 10, 2003, from the Chief State Appraiser, California, to the District Manager, California Desert District, on the subject of: "Review of Highest and Best Use Feasibility Report for Eagle Mountain Landfill". Attached to the memorandum is a copy of a review of Mr. Herzog's report shown in A above, signed by Nancy Ortiz. Filed as Exhibit A to the Defendants' January 13 Joint Reply Memorandum in Opposition to Plaintiffs' Motions for Summary Judgement and in Support of Defendants' Joint Motion for Summary Judgement: *FLPMA ISSUES.*

C. A memorandum dated January 10, 2003, from the District Manager, California Desert District to the State Director, on the subject of "Summary of Steps Taken to Supplement the Administrative Record For the Eagle Mountain Land Exchange. Filed as Exhibit B to the Defendants' Joint Reply Memorandum in Opposition to Plaintiffs' Motions for Summary Judgement and in Support of Defendants' Joint Motion for Summary Judgement: *FLPMA ISSUES.*

5. I swear under penalty of perjury that the foregoing is true and correct.

Dated this 31th day of January, 2003.

Thomas Gey
Bureau of Land Management
6221 Box Springs Blvd.
Riverside, California 92507

APPENDIX I
Memo to State Director

United States Department of the Interior
BUREAU OF LAND MANAGEMENT
California Desert District Office
6221 Box Springs Boulevard
Riverside, CA 92507-0714

IN REPLY REFER TO:
2200
CACA 30070
(CA-063.51)

TO: State Director

FROM: District Manager, California Desert

SUBJECT: Summary of Steps Taken to Supplement the Administrative Record For The Eagle Mountain Land Exchange.

On September 25, 1997, the California Desert District Manager signed a Record of Decision approving an exchange of lands with Kaiser Eagle Mountain, Inc. The decision was subject to administrative appeals, with the Interior Board of Land Appeals affirming the Bureau of Land Management's (BLM) decision on September 30, 1999. The exchange was completed on October 13, 1999, but is now the subject of litigation in the United States District Court for the Eastern District.

On November 6, 2000, the Ninth Circuit Court of Appeals issued an opinion in *Desert Citizens Against Pollution, et al. v. Bisson*, et al. 231 F.3d 1172 (9th Cir. 2000). In *Desert Citizens*, a case involving a BLM

land exchange associated with the Mesquite Regional Landfill, the Ninth Circuit found the appraisal of the federal lands was flawed because its analysis of highest and best use of the federal lands did not meet the requirements of the Uniform Appraisal Standards for Federal Land Acquisitions.

Subsequent to the Ninth Circuit's decision, the Plaintiffs in the Eagle Mountain litigation expanded their complaints to include issues considered in Desert Citizens. Plaintiffs also submitted a declaration by Stephen D. Roach, which stated that the original appraisal by David Yerke, which BLM, relied on, did not meet federal standards because it did not analyze the possibility that the highest and best use of federal lands may have been for landfill purposes.

We feel the administrative record supports BLM's decision in this case, and disagree with Plaintiff's assertions to the contrary. However, in light of the Ninth Circuit's opinion in Desert Citizens, we felt an independent analysis of whether a landfill was the highest and best use of the federal lands was justified. We were prepared to accept the results of this new analysis, regardless of its implications to the District Manager's decision of September 25, 1997.

We contracted with Steven J. Herzog, a private appraiser, to complete a new and expanded analysis of the highest and best use of the federal lands. Mr. Herzog was instructed to focus specifically on the issue of whether a landfill project was the highest and best use of the federal lands when the District Manager approved the exchange September 25, 1997.

Mr. Herzog has completed his analysis and his report has been reviewed and approved by the Chief State Appraiser in California. Mr. Herzog concluded that landfill use was not the highest and best of the federal lands as of September 25, 1997, primarily because the landfill project was not financially feasible at that time. Key to Mr. Herzog's analysis was his conclusion that as of September 25, 1997, the available information indicated a rail haul disposal facility would not be needed for another 10 to 15 years.

Aside from stating that the federal lands do not have "imminent development potential" Mr. Yerke's appraisal did not articulate why the proposed landfill project was not the highest and best use of the federal lands. Mr. Herzog's report more fully articulates why landfill use was not the highest and best use of the federal lands in 1997.

I have reviewed Mr. Herzog's report and found nothing which indicates that it is necessary to revise or revisit the District Manager's decision of September 25, 1997 approving the exchange. Section 206(a) of the Federal Land Management and Policy Act of 1976 provides: "**..when considering the public interest the Secretary concerned shall give full consideration to ... the needs of State and local people...**" The administrative record clearly demonstrated that the public interest would be well served by the exchange because, among other benefits, it facilitated a project meeting the needs of State and local residents and met all other statutory and regulatory requirements. In the Record of Decision signed September 25, 1997, the District

Manager specifically explained how the exchange would serve the public interest.

Mr. Herzog's conclusion that the Eagle Mountain Landfill was not financially feasible in 1997, does not diminish the public interest the project could serve in meeting long term waste disposal needs of State and local residents. In fact, while Mr. Herzog concluded the project was not financially feasible in 1997, he acknowledged that such rail-haul landfill facilities could still serve to meet the long term landfill capacity needs in southern California.

Mr. Herzog's findings are also fully consistent with the conclusions in the draft Environmental Impact Statement that additional landfill capacity was needed to meet long-term demands (i.e. 1995-2050) for the Southern California region. After giving due consideration to Mr. Herzog's report, I have concluded the District Manager's determination in the September 25,1997 Record of Decision that the exchange was in the public interest was well supported by the information available at the time and remains valid.

APPENDIX J
Memo re Feasibility Report

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
1 California State Office
2800 Cottage Way
Sacramento, CA 95825

In Reply Refer to:
9300 (930)

January 10, 2003

Memorandum

To: District Manager, California Desert District

From: Chief State Appraiser, California

Subject: Review of Highest and Best Use Feasibility Report for Eagle Mountain Landfill

The appraiser was asked to provide a consulting report which analyzed the Eagle Mountain Land Exchange property's highest and best use potential for landfill as of September 25, 1997. The property consists of 3,481 acres in the proximity of the Eagle Mountain Mine in Riverside County California.

Purpose of the Consulting Report: Mr. Herzog states in his Summary of Problems that the primary purpose of his analysis is to "provide an analysis of the financial feasibility of the landfill use as of the effective date." As stated prior, the effective

date is September 25, 1997. In order to determine the financial feasibility of the property's potential use for a landfill a discounted cash flow analysis is the most effective tool used in conjunction with an analysis of the landfill market at the time specified. It appears that Mr. Herzog did a very thorough job of both of these analyses in his report. The appraiser devotes approximately 62 pages to documenting the research he has done into the market and demand for landfill in Southern California during the time leading up to the effective date of his report. He uses and quotes a variety of publications, newsletters, and Journals.

Additionally, Mr Herzog was asked to address valuation issues raised in association with BLM's reversionary interest in a townsite located on the property.

Purpose and Scope of the Review: Please note that the report under review is not an appraisal and no value conclusion was rendered. The purpose of my review is to evaluate the research completed and the resulting conclusions of the consulting report based on the information presented and in the context of the instructions given. My review will be used by BLM management. I understand that this is a matter in litigation and my review may be used by DOJ in defending the litigation.

Standard Rule 3 of USPAP relating to Appraisal Review, Development, and Reporting states *"The review requirements in this Standard do not apply to:"* among other things, *"an appraiser's study of work prepared by other types of experts, such as engineers or other consultants, or to work prepared by an*

appraiser in a appraisal consulting assignment under Standards 4 and 5,"

Although my review does not necessarily constitute a USPAP Standard 3 Appraisal Review, for practical and organizational purposes, my review will cover similar items required in a Standard 3 Appraisal Review where applicable. The consulting report will be reviewed in the context of Standard Rule 4 USPAP requirements and applicable federal standards.

This review is based on the my analysis of the logic and information contained in the report, my knowledge of the market area and accepted appraisal methodology, and my knowledge and understanding of applicable professional and federal appraisal standards including The Uniform Standards of Professional Appraisal Practice (USPAP), the Uniform Appraisal Standards for Federal Land Acquisitions, and the 43 CFR 2201.3-2 and 3-3.1 accompanied the appraiser on a field inspection of the subject property on June 13, 2002.

My review, relies on the landfill research and information provided by Mr. Herzog in the report and attachments and information gathered from my participation in numerous discussions with specialists in the landfill industry pertaining to the industry in general and the analysis of this property as a potential landfill.

Competency: Determining the Federal property's feasibility for a potential landfill as a highest and best use was a requirement for this

assignment as per the instructions. The appraiser has a diverse background in real estate appraisal and specializes in appraisals of special use properties. He stated in his qualifications that he had previously appraised the federal lands involved in the proposed Mesquite Regional Landfill. In *Desert Citizens Against Pollution v. Bisson*, Civ. No. 96-2011-B (JFS) (S.D. Cal.) The District Court found that Mr. Herzog's appraisal report cured any defects found in the original appraisal by the Ninth Circuit in the original appraisal in that case with regard to landfill use. He conducted considerable research for this assignment which afforded him an in-depth understanding of the history of the landfill industry and market conditions for southern California during the time frame relevant to the date of this analysis. Additionally he engaged experts in landfill engineering, appraisal, and economic analysis as subcontractors to assist in development of the report's conclusions. These actions reinforced his competency in completing this consulting assignment according to USPAP standards.

Appraiser's Use of Consultants: The appraiser employed experts in the fields of landfill valuation, engineering, and economics to assist in developing key aspects of the analysis. The appraiser describes the UAS standard that applies to the use of consultant reports and how he has met that standard. He described his required outputs from their reports, how these would be used in the analysis, and the general qualifications of the consultants as experts in their fields. My review indicates that the appraiser used these consultants and their contributed reports and information

appropriately and in compliance with applicable standards.

Consultants used were: Rencon Research Corp, a firm specializing in landfill economics, provided analysis regarding an appropriate discount rate applied to potential royalty income for landfill lands. EMCON Engineering firm with landfill experience, analyzed the time line and process for permitting and where Eagle Mountain was within that process as of September 25,1997 and also provided estimates of the costs related to obtaining permits. Jerry Jones, MAI, an appraiser with considerable landfill valuation experience, assisted in providing consulting services to Mr. Herzog and royalty agreement information pertinent to the Discounted Cash Flow Analysis. Additionally Mr. Herzog states that Mr. Jones actually reviewed his report, although no written statement from Mr. Jones is attached to the report.

The credentials and qualifications of the consultants appear to be more than adequate for providing appropriate landfill analyses and information to Mr. Herzog. As noted above, the District Court in the *Desert Citizen's* case utilized Mr. Herzog's appraisal of a similar land exchange for landfill purposes to find that BLM had satisfied the Ninth Circuit's ruling in that case. We are therefore very familiar with Mr. Herzog's work and those of the consultants and confident of their competency in this case.

Summary of Risk Factors Unique to Eagle Mountain: The appraiser acknowledges the special

risk factors unique to the Eagle Mountain's potential use as a landfill. (1) It's proximity to Joshua tree National Park will draw close monitoring of off-site impacts, i.e. noise, air and water quality, odors, and lighting issues are among them. Any change to the ecosystem will draw significant attention. (2) Over 1/3 of the property remains without permits, raising the risk, feasibility, and competitiveness of the project due to the uncertainty of ever getting permits. (3) A proposal by Energy Crest Energy Corporation to use two of the (Eagle) pits for water reservoirs. The two pits have an elevation differential conducive to hydroelectric power generation. It does not appear that this project could co-exist with a landfill. Although, the first permit application was denied it has since been re-submitted.

Business Value Considerations: Starting on page 10 of his report Mr. Herzog has ensured that his analysis will demonstrate the value attributable to the land or real estate and not the business by using the most reliable method for this purpose that is widely accepted by the appraisal industry and the courts i.e., the royalty income methodology. He quotes from several resources on this approach including a 1981 court case. This is well established method of valuing the real estate rather than the business. Jim Eaton, MAI, SRA, states in his book *Real Estate Valuation in Litigation: "The appraiser should capitalize the rental, or royalty, income that would be generated by the property, rather than the business income."*

Mr. Herzog goes on to define and discuss for the user other factors that will be significant to his

feasibility analysis such as Plottage or Assemblage, Excess Land and Surplus Land, and a list of Solid Waste Terms and Definitions.

He also reiterates his instruction to analyze the property on a stand alone basis and in combination with other ownerships. The EMCON report concludes that the subject BLM lands would not have been financially feasible, as of the effective date of the report, on a stand alone basis nor would the Mine Reclamation Corporation (MRC) property stand alone as a landfill. However, Mr. Herzog is expected to draw his own conclusions based on his own analysis of the property from a market perspective.

Adequacy of the Original Eagle Mountain Appraisal: As the Reviewer of this report, I feel it is important to discuss significant aspects which triggered this assignment and comment on how they were addressed in Mr. Herzog's report. An appraisal of property is a significant document which helps support a "*rational basis*" for BLM's decision to complete a land exchange. It also assists the BLM in *"articulating a rational connection between the facts found and conclusions made."* One important conclusion reached allowing the Eagle Mountain exchange to take place was that *"the value of the public lands conveyed away is equal to the value of the non-federal lands to be acquired, taking into account any cash included as part of the exchange."* The quotes are from the Ninth Circuit Court Ruling in *Desert Citizens Against Pollution v. Bisson*, (9th Cir. 2000).

BLM's land exchange with Kaiser is being challenged in federal court. The original appraisal completed by David Yerke, MAI supported an "equal value" exchange. In light of the *Desert Citizen's* ruling referenced above, BLM expected the validity of the appraisal completed for the Eagle Mountain land exchange to be an issue. The contention was expected to be similar to the Mesquite Landfill case in that the highest and best use analysis did not adequately consider municipal landfill as a possible highest and best use for the "selected lands", even though that was the known intended use. The assumption being that if the landfill use had been more thoroughly analyzed the value would have been significantly different. This would call into question the value conclusion and whether the Eagle Mountain Exchange was an equal value exchange as required by FLPMA and BLM regulations.

The subject property was not a permitted and entitled landfill property as of September 25, 1997, (Date of the ROD). Therefore, it could not actually be used as a landfill as of that date. Nevertheless, because that was Kaiser's intended use, it is nit unreasonable for the property to be evaluated for landfill potential as of the date of the decision.

As a result of the Ninth Circuit's decision in *Desert Citizens*, the BLM desired a thorough and independent analysis of the potential for landfill use of the public lands as of September 25, 1997 to determine if, indeed, landfill would have been a feasible highest and best use. If the analysis concluded that it was, then it is possible that a significant difference in value could have resulted for

the selected lands in the Eagle Mountain Land Exchange.

Issues Related to Highest and Best Use (HBU) Analysis: The consequences of an incomplete HBU analysis is a potential mis-judgment of the highest and best use conclusion for the property. This becomes especially germane when the value conclusion is significantly effected.

In reviewing this report I find that Mr. Herzog considered the potential use of the subject property as a landfill in great depth. He completed a detailed study of the waste management industry during the time frame of the date of this analysis, 1997 (reference pages 15 through 78). Excerpts from numerous articles and reports published at that time are included that demonstrate the complications of predicting the potential need for rail haul waste facilities; the difficulties in developing and permitting such facilities and describe the potential for extremely high monetary returns if a developer is successful in the entitlement process and a facility becomes operational. The report cites numerous regulations that affect the permitting process including Subtitle C and D of the Resource Conservation and Recovery Act which had a major impact on the industry and costs of permitting starting in the early 1990s. The unpredictable and speculative nature of developing such facilities is apparent in the discussion. The appraiser estimates the time from conception to final permitting of a landfill facility in California is 10 years and costs many millions of dollars, apart from legal challenges inevitably faced by such ventures. The development

of such facilities draws a great deal of opposition from various groups. This, along with the enormous development costs and up front investment required, make such ventures extremely high risk.

Mr. Herzog thoroughly analyzed the subject property from a landfill use perspective. A potential use for a property must past each of four tests in sequence to result in a conclusion of highest and best use. Assuming that the potential landfill use had passed the first two tests of (1) **legally permissible** and (2) **physically possible** (page 15), his analysis primarily focused on steps (3) **financially feasible** and (4) **maximally productive**. If the potential landfill use passed these latter tests financially feasibility and maximally productive, this use would be considered the **highest and best use**.

As stated prior in the Competency section of my report, the services of experts in the fields of landfill appraisal, economics, and engineering were enlisted by Mr. Herzog to provide assistance and input in their specific areas of expertise relating to the analysis.

In order to properly consider the extent to which the acquired permits increase the probability of landfill as a highest and best use and affected the value of the subject, the appraiser enlisted assistance from EMCON engineering. EMCON considered the entire permit process and the position of the subject property within that process as of the effective date of the is report (Page 9, Item 4). The appraiser has stated on page 10 that, in spite of wording in the EMCON engineering report which may have

indicated a different perspective, *"The subject is being considered in its "as is" condition as of the effective date, without regard as to how it came to be in that condition. The position of the Eagle Mountain in the landfill permitting process is recognized as of September 25, 1997."*

Landfill Feasibility Conclusions: Risk is an important aspect of evaluating the potential of landfill as a highest and best use. The appraiser devotes several pages in his report evaluating several attempts, both successes and failures, by various companies in obtaining final permits to construct landfills. His conclusion (page 78) is that: *"until the final court rules on the final issue, there is no certainty of obtaining a landfill permit." "Consequently, the risk of failure is extraordinarily high. This is true regardless of how close the finish line appears to be."* The appraiser relied on economist consultant's (Recon Research) report which suggested a 29% discount rate would be appropriate for discounting the future royalty income stream from the Eagle Mountain Landfill. The discount rate did not incorporate the additional risk, after the permits have been obtained, of obtaining a waste stream contract even though significant competition exists for the waste stream in Southern California. As the reviewer I consider this discount rate reasonable, and possibly conservative, considering that an actual contract for the income producing waste stream is a presumption that may or may not materialize and, as of the date of the report, seemed an unknown as to if and when this would occur. The result of the DCF analysis in conjunction with the appraisers analysis of all other market factors including the subject

property's position in the permit process, concluded that rail haul landfill would not be an economically feasible use as of September 25,1997.

The EMCON engineering firm addressed the landfill project feasibility from the perspective of assemblage to the neighboring Kaiser lands and as a stand alone property (page 43). However, the appraiser, after completing a detailed Discounted Cash Flow (DCF) on the property provides his own conclusion of the feasibility of the subject property in any configuration on page 108: *"...because the highest capacity and most competitive landfill configuration is not feasible, the reduced capacity and more expensive per unit configurations residing on individual BLM and MRC ownerships are not feasible. This leads to the conclusion that there are no plottage or assemblage benefits to combined ownerships, and neither are there surplus and excess land situations that must be considered."*

This independent report thoroughly analyzed the subject's potential for landfill as a highest and best use and provided a feasibility conclusion based on this analysis.

Market Data Search: What, if any, premium would be paid for land as a result of intended landfill use by the buyer? This is an important question and could be helpful in determining if the subject was undervalued. The rationale being that any prudent private owner would not sell their land to a developer, knowing the intended use was landfill, without considering the value of his land in terms of a potential landfill. The buyer in this case, Kaiser,

was in the process of acquiring the permits required for landfill development of the subject at the time of the original appraisal.

To answer this question the appraiser conducted a search for comparable sales of properties with similar landfill potential. Two sales in the Western United States were found. The sales involved lands which were purchased by developers specifically for landfill development. The properties involved were similar to the subject in that they were not fully permitted. The relevance of these sales is briefly discussed below.

Lonetree Balefill in Fall River County, South Dakota was a cash sale of a non-permitted property to South Dakota Disposals Systems (SDDS). The sale date was October 26 1988, and less than one year later they received a permit to operate a landfill from the South Dakota Board of Minerals and Environment. The sale price verified by the appraiser was $80/acre which was $20 to $30/acre over the market value of the land which was $50 to $60/acre. The premium was offered by the SDDS to the land owner in order to insure continued public support from the local community. In other words, the premium was related to public relations. This site already had rail access in place and local support which made it well suited for landfill.

The second sale was for agricultural property sold to Crestline Investment Group, Inc. from two different landowners. The sale price for the two properties was $1,500/acre and $1,562.50 with the higher priced property having irrigation potential

and the seller carrying financing for $500,000. Verification of the sales by the appraiser indicated that these prices were commensurate with agricultural prices in the area. The buyer paid a commission of 10% to the Broker who helped find suitable lands and put together the deal. This site was fully permitted as of March 1998 less than a year after the sale agreement was entered into in April 1997. This property also had existing rail access in place.

The above sales presented by the appraiser are compelling evidence that lands with unique characteristics suitable for potential landfill, but without final permits, do not appear to command prices significantly higher than they would if sold for their current non-landfill uses. The sellers in both cases were well aware of the intended use. One could argue that the "public relations premium" paid for Lonetree would not have occurred had the intended use not been for landfill. Even so, the premium does not appear to be extremely high and seems insignificant when one considers that the property already had rail access and a one year permitting process compared to the average ten year process encountered in California. A developer would likely be more willing to pay a higher price for a property that could be permitted in one year than one which would take ten years or more. Additionally, there appears to have been no premium whatever paid for the Crestline property which went on to become an operational landfill.

The story of the Lonetree Balefill project is a graphic portrayal of the risk involved in landfill

ventures. Shortly after permits were issued for Lonetree the development was challenged by an environmental group. Mr. Herzog summarized the conclusion, *"After a six year battle in state and federal courts and project development costs of $5.6 million SDDS abandoned the project in 1994 but continued its legal battle."* SDDS was upheld in the U.S. Supreme Court and the amount of damages to be paid to SDDS is yet to be determined in the State Supreme Court based on the principle called *"temporary taking without compensation"*. SDDS sold the land to a local rancher for $60,000 or about $50/acre. It demonstrates that even though permits are in hand, and there is local support for the project, there is still no guarantee that a landfill can be successfully developed.

The above sales assist the appraiser in determining whether landfill developers purchase lands uniquely suited for landfill potential at premiums above surrounding lands without final permits in place. The sales indicate that there is not a significant premium paid for such lands. In addition to this, the Lonetree project indicates that the risk of failure continues to be high no matter the position of the landfill property in the permit process, *including* successful acquisition of all necessary permits.

Purchase Agreement of the Subject: The appraiser acknowledge and discussed the relevancy of the purchase agreement of the subject property. L.A. County Sanitation District and Kaiser have entered into an agreement for sale of the subject at $39,000,000 plus 4% interest from the May 2001

until June 2002. A $2,000,000 premium was to be paid conditioned on the Sanitation District being granted a CUP by the County extending operations at their current facility, Puente Hills, until 2013.

From the reviewer's perspective, aside from the fact that the date of this agreement is August 9, 2000, almost 3 years after the effective date of this analysis, there are three primary criteria that enter into the relevancy of this agreement as an indicator which would support the feasibility of Eagle Mountain as a landfill as of the date of this analysis, September 25,1997. (1) Were market conditions as of the date of the agreement reflective of the conditions as of the date of the analysis? (2) Were the motivations behind the transaction indicative of an arms length transaction? (3) Was the price based on the market value of the property for its economic highest and best use? Normally this value is determined via a *"competent appraisal"* as indicated in the Uniform Appraisal Standards for Federal Land Acquisitions UAS.

The appraiser does a very good job of analyzing this agreement against the above three criteria. His conclusions are summarized as follows:

(1) The agreement was entered into on August 9, 2000, several years after the date of this analysis. *"The proposed Eagle Mountain Landfill, of which the subject lands were to be a part, was initiated during a time of projected landfill capacity crisis for Southern California cities."* Mr. Herzog's investigation of the landfill industry during the years leading up to and after the effective date of the this report showed how

the industry projections and economic conditions for landfills changed and the projected demand for rail-haul became a long term venture. He summarizes how these changes effected the demand and feasibility of rail-haul landfills and the Eagle Mountain Landfill *"When the landfill capacity needs in the target market became long-term requirements rather than a short-term crisis, the waste company cut its losses and walked away, leaving over $45,000,000 behind."* The appraiser determines that the August 9, 2000 Sanitation District/Eagle Mountain agreement is not reflective of the same conditions that existed as of September 25,1997. These changes in the industry effected the motivation of the buyer and seller as discussed below. The prior quotes are from the appraisers report.

(2) The Sanitation District of Los Angeles County became interested only from the standpoint of insuring adequate waste disposal capacity for it's members in anticipation of their Puente Hills truck haul facility reaching capacity between 2006 and 2013. The appraiser discussed the sale motivations with the buyer and found that *"The districts had hoped that the proposed rail-haul facilities would be privately operated so that the Districts could simply pay disposal fees."* Due to market and industry changes indicated above and discussed in more detail in the report, it appeared that the Eagle Mountain Landfill and others in the area would lie dormant for some time without waste-stream contracts that would make them economically feasible. At this time the Sanitation District became interested in purchasing the Eagle Mountain and Mesquite Regional Landfill for what Mr Herzog refers to as

"insurance". The appraiser provides an article from the Waste Age, Oct 1, 2000 *"We've avoided the unknown," says Don Nellor, assistant head of the District's solid waste management department. If we were not able to acquire [these new landfills], we might have found ourselves with very limited options when we really needed them."* The article goes on to state that the Districts have *"bought the luxury of a slow transition"* from local disposal to rail disposal. The appraiser concludes *"It appears that LA Sanitation Districts felt compelled to acquire the MRL and Eagle Mountain sites as insurance of having adequate landfill space on a long-term basis in spite of financial feasibility considerations ("avoiding the unknown" – see article on page 90)."*

(3) The price agreed to appears to have had no basis in economic market value which motivates the typical buyer and seller in an arms length transaction. Rather it appears to have been based on compensating the sellers for their costs associated with permitting for rail-haul landfill purposes and eliminating all risk and costs associated with legal challenges. I have collected information from Kaiser concerning this sale. The factors stated on page 95-97 of the report relative to how the price was derived are consistent with the facts presented by Kaiser. The appraiser has also verified the facts with the buyers. The story is consistent. To summarize from page 93 of the report, "The price paid for Eagle Mountain was derived from the price paid for the MRL. The Districts's analysis associated with arriving at a price to pay for a fully permitted MRL; concluding that the districts would face similar costs in developing a similar landfill; and incorporated an

allowance for what the Districts' cost of capital would be. The Districts were well aware that the costs had been significantly greater at Eagle Mountain than at the MRL, but they were not willing to pay more for Eagle Mountain than for the MRL. An appraisal was not done in either case." In addition it appears that feasibility analysis of the Eagle Mountain property as a landfill was also not done. Apparently seeing no other offers in sight, Kaiser accepted.

The appraiser further analyzes this sale from an economic standpoint using an IRR analysis. The results do not support an economic basis for the price paid in the Sanitation District/Eagle Mountain agreement. This measures the return on capital generated or anticipated on a particular investment or portfolio over time. Ideally it would be a positive number higher than or at least at the level of inflation.

In the Eagle Mountain agreement the IRR calculated by Mr. Herzog was a negative 6.5 to 7% dependent on the receipt of the $2,000,000 incentive bonus. If the $45,000,000 was taken out of the expenses category and treated as a donation the IRR was only 4%. Only 1% higher than inflation of 3% at that time.

In addition to all of the above the sale agreement is conditioned upon having all of the zoning and permits in place for landfill development and **all legal challenges settled**. Based on this condition and the legal challenges pending, in my mind, there is no guarantee that the agreement will actually be consummated.

The appraiser's conclusion is that the pending sales price *"cannot be used as a measure of market value, especially considering how the price was established.* The agreement also reflects the *"contingent price being offered for a fully permitted rail-haul facility in the fall of 2000, not a partially permitted one in the fall of 1997."* Based on the appraiser's analysis and my own knowledge of this sale agreement I believe the appraiser's conclusion is supported. The appraiser goes on to provide a substantial quotation on page 98 from the "Yellow Book" or UAS which further supports the questionable nature of the purchase agreement as a legitimate indication for the market value of the Eagle Mountain property.

The DCF Analysis: Financial feasibility is the key test that would validate or invalidate landfill for the subject property as a highest and best use. The appraiser used a DCF analysis to determine the financial feasibility of the subject for that use as of September 25,1997. The appraiser conducted a detailed analysis of the costs and potential income of a rail haul facility. The EMCON Engineering firm was employed to provide an analysis of where the Eagle Mountain project stood within the permitting process as of September 25,1997, and verification of the costs incurred in moving the project through the permitting process up to that point. In addition EMCON determined what steps remained in the permitting process, projected costs, and a reasonable estimate of the time it would take to acquire final permits. EMCON also analyzed the demand/supply situation for landfill as of the effective date and

estimated the expected tipping fees that could be collected.

In the case where the landowner retains ownership of underlying land rather than selling it outright to a developer the landowner typically receives a royalty. The appraiser uses four private landfill land use agreements from which to extract a market derived royalty rate applicable to the subject. The economics firm RECON developed the discount rate that would be appropriate for determining the present value of the expected royalty income stream generated by the Eagle Mountain project. In reference to this approach I quote from a review that Mr. Jones conducted of the Mesquite Regional Landfill appraisal report explaining the validity of this approach: *"The Royalty Approach has many benefits for an appraiser in the valuation of the real property component of real estate. First, market data is available. Second, the Royalty Approach requires the fewest assumptions of any procedure including the Cost or Sales Comparison Approach. Third, it is commonly used in the valuation of wasting assets and landfills. Fourth, although the available market royalty data includes comparables outside the state, the data is considered relevant because landfills are regulated by the federal government, which lends to their uniformity and applicability as market data."* In addition there is further support for this methodology above in the "Business Value Considerations".

The appraiser uses an income projection period of 91 years in the DCR as indicated from the estimated life of the landfill EIS/EIR, once activated. Normally a shorter time frame is used due to the fact than

income beyond 25 or 30 years begins returning a nominal present value. The appraiser seems to acknowledge that fact by pointing out that the final year's royalty contributes only $0.01 to the NPV. I don't consider this long projection period to be a significant factor in the final conclusion of the analysis since it would only nominally effect the final number generated.

Feasibility Conclusion From the DCF: The results of the DCF or Income Approach to value for the lands associated with the Eagle Mountain Landfill is an NPV of $2.5 million. The appraiser states that *"With the benefit of hindsight, the NPV of the net income to the landfill would have had to exceed $13 million in 1997 just to make it feasible to press on with the permitting effort not the $2.5 million indicated by the DCF."* His conclusion: *"The combination of the appropriate discount rate and a long period of time before the waste stream, and associated income arrives, drives the NPV below the level of financial feasibility."*

The use of the reports generated by both EMCON and RECON were helpful to the appraiser in developing realistic inputs for the DCF analysis. My review of the analysis indicates that the inputs were reasonable and derived from credible sources including the market. The conclusions are considered to be reasonable and supported.

Why did Kaiser persist in the face of infeasibility of the landfill enterprise?: In summary the appraiser answers this question: BFI had contributed $45 million of the $49 million that

had been spent at the time of their departure in 1994 leaving behind their $45 million dollar investment for better more feasible prospects elsewhere. Quoting from page 108 of Mr. Herzog's report: The remaining proponents had only $4 million invested, but the only way to recover any of the investment was to press on with the permitting effort." Furthermore "the expectation constantly existed that the time when final permits would be obtained was near at hand." Having only $4 million of their own invested and the leverage of $45 million left by BFI they felt it was worth the risk and investment to persist in the permit process. Acquisition of the permits was the only way to make the property marketable and possibly recover their investment in a possible sale. This finally came to pass with The Sanitation District Purchase Agreement, however this agreement is still subject to substantial contingencies including "all litigation being resolved' and has not, as of yet, been consummated.

The Townsite Reversion: The appraiser was also asked to determine if the original appraisal had undervalued the reversionary interest of the Eagle Mountain Townsite. This requirement stems from a declaration from Mr. Roach, a fee appraiser who criticized the original appraisal for valuing the townsite in "fee simple" and not considering the contribution of either the improvements (consisting of homes) or the income from the prison lease. The BLM had determined at the time of the original appraisal that Kaiser was in compliance with the terms of the reversion clause. Mr. Herzog states that *"Most of the structures associated on the townsite were in a state of disrepair in 1996 when the appraisal was done. This*

was also the situation when I inspected the property." I concur with this statement since I have been on the property and viewed the structures both in 1996 and in June of 2002.

Mr. Herzog takes into account the extreme remote desert location of the townsite coupled with the close proximity of open mine pits and huge piles of mine tailings, combined with the overall unattractive setting of the townsite. The structures were originally built to provide basic housing for the employees of the mine. The vast majority are now deserted and dilapidated. A few are being used to shelter employees of the mine office and prison being leased on die property. The "prison and associated commercial uses" referred to by Mr. Roaches declaration have been producing a negative net operating income for Kaiser from 1996 through 2001. The lease is extended from year to year and is tenuous.

The results of Mr. Herzog's investigation into this is: *"For reasons detailed above, the reversionary interest in this site appears to have little if any market value. The approach taken in the appraisal simplified the appraisal assignment, and was probably to BLM's advantage. It certainly appears that the BLM's actual interest in the townsite was not undervalued in the appraisal."*

REVIEWER'S CONCLUSION

From my review it appears that Mr. Herzog has been conscientious in providing an independent analysis and his report meets applicable USPAP and

Federal standards and the requirements of the instructions for the assignment provided by BLM. He has thoroughly analyzed the subject's potential for landfill as a highest and best use, using appropriate methods and consultants, and provided a feasibility conclusion based on his analysis. As the reviewer, I believe that the appraiser has addressed concerns relative to the landfill as a potential highest and best use as of September 25, 1997. He has also effectively addressed the townsite reversionary interest value issue.

Nancy Ortiz
Chief State Appraiser

Attachment – Assignment Instructions

REVIEWER'S ASSUMPTIONS AND LIMITING CONDITIONS

1. The review memorandum is based on information and data contained in the report which is the subject of the review. Data and information from other sources may be considered. If so, they are identified and noted as such.

2. It is assumed that such data and information are factual and accurate.

3. The reviewer reserves the right to consider any new or additional data or information which may subsequently become available.

4. Unless otherwise stated, all assumptions and limiting conditions contained in the report, which

is the subject of this review, are also conditions of this review.

REVIEWER'S CERTIFICATION

I certify that, to the best of my knowledge and belief:

– The facts and data reported by the review appraiser and used in the review process are true and correct

– The analyses, opinions, and conclusions in this review report are limited only by the assumptions and limiting conditions stated in this review report, and are my personal, unbiased professional analyses, opinions and conclusions.

– I have no present or prospective interest in the property that is the subject of this report and no personal interest with respect to the parties involved.

– I have no bias with respect to the properly that is the subject of this report or to the parties involved with this assignment

– My engagement in this assignment was not contingent upon developing or reporting predetermined results.

– My compensation is not contingent on an action or event resulting from the analyses, opinions, or conclusions in, or the use of, this review.

– My analyses, opinions, and conclusions were developed and this report was prepared in conformity with the *Uniform Standards of Professional Appraisal Practice.*

– I did personally inspect the subject property of the report under review.

– No one provided significant professional assistance to the person signing this review report.

– To the best of my knowledge and belief, the reported analyses, opinions and conclusions were developed, and this review has been prepared in conformity with requirements of Code of Professional Ethics and the Standards of Professional Appraisal Practice.

Reviewer:_____ Date: 1/10/03

Instructions for an analysis and report on valuation issues of the federal lands in the Eagle Mountain Land Exchange

Background

On November 6, 2000, the Ninth Circuit Court of Appeals issued its decision in *Desert Citizens Against Pollution v. Bisson* (the Mesquite case). The court held that the appraisal of the federal lands in the exchange was flawed because it did not consider landfill as a possible highest and best use of the public lands even though all parties were aware that the exchange proponent intended to use the public lands for landfill purposes.

On September 25,1997, the Bureau of Land Management (BLM) issued a decision approving a land exchange with Kaiser Eagle Mountain, Inc. (Kaiser), involving public lands surrounding the Eagle Mountain Mine, in Riverside County.

Simultaneous with the land exchange process, Kaiser and Mine Reclamation Corporation sought State and local permits for a landfill which would involve some of the public lands.

The land exchange was completed October 13, 1999, and the exchange is currently the subject of litigation in federal court. The BLM expects the validity of the appraisal completed for the Eagle Mountain land exchange may be an issue in the litigation given the Mesquite decision.

Since BLM is a party to the lawsuit, we are seeking an independent analysis as to whether landfill use could have been the highest and best use of the federal lands as of September 25, 1997. We expect and intend that the analysis would supplement BLM's administrative record and may serve as a reference tool for the litigation.

Scope of work

BLM desires a landfill-use financial feasibility analysis and report prepared in conformity with the *Uniform Appraisal Standards For Federal Land Acquisitions* (Washington, D.C. 2000) and the *Uniform Standards of Professional Appraisal Practice* (2002 edition), to the extent appropriate. The analysis and report must also conform to 43 Code of Federal Regulations 2201.3-2&3.

In addition, an independent opinion should be offered and supported as to whether or not the "townsite" valuation methodology in the appraisal resulted in an undervaluation of this parcel.

Instructions

In completing this report, the appraiser is to use a date of value of September 25, 1997, and is to give appropriate consideration to all actions which occurred up to that date which may affect the financial feasibility of landfill use of the lands and their value. This would include, but not be limited to the land exchange agreement between BLM and Kaiser and actions taken by Kaiser, Mine Reclamation corporation, and various public entities in the landfill permitting process.

1.) **Financial feasibility analysis:** The BLM's primary concern centers around the question of whether a landfill is the highest and best use of the federal lands. In order for landfill use to be the potential highest and best use of the property, it would have had to be a financially feasible use as of the effective date. You should consider and explain the process of determining financial feasibility of landfill use. The BLM requires a complete review of the facts in this case pertaining to this issue. Your analysis and conclusions must be thorough, well documented and supported. You are to retain whatever experts you may need as subcontractors to assure the completeness of your research and analysis.

In conducting an analysis of the subject property for use as a landfill you should employ all applicable means of analysis.

In addition to considering a highest and best use of the property as a stand alone landfill, you should

consider the possible highest and best use of assemblage of the federal lands with Kaiser's lands for use of the merged lands for landfill purposes.

The analysis should consider the federal lands in their current condition, but should disregard any recognizable environmental condition that may require remediation to make the property suitable for landfill purposes.

In reporting your analysis and conclusions, you should cite appropriate appraisal reference material.

2.) **Townsite:** As part of this exchange, the U.S. conveyed the reversionary interest held on a 460 acre townsite parcel conveyed under special legislation. With regard to the townsite parcel, the appraiser is to research the issues relating to this parcel and offer explanations and conclusions as to whether or not the original appraisal underestimated the value of the interest in this parcel.

Exercise Independent Judgment

You must exercise independent judgment. This instruction means that you should consider other possibilities not discussed in this set of instructions.

APPENDIX K
Environmental Impact Statement (Excerpts)

1.3.1 Project Purpose and Need

The primary purpose of the Project is to develop a new-Class III nonhazardous municipal solid waste landfill to meet the projected long-term demand for environmentally sound landfill capacity in Southern California; provide a long-term income source from the development of a nonhazardous municipal solid waste landfill; find an economically viable use for the existing mining by-products at the Kaiser Eagle Mountain Mine site, including use of existing aggregate and overburden; and provide long-term land use and development goals and guidance for the Townsite.

Several recent studies documenting the need for additional landfill capacity in Southern California indicate that additional capacity is needed to meet the long-term demands (i.e., 1995 to 2050) and possible short-term needs (i.e.. 1995 to 2000) of the Southern California region (California Integrated Waste Management Board [CIWMB], 1992: CIWMB, 1994, Draft Countywide Siting Elements—for the seven counties viewed as potential sources of waste for the proposed landfill—1995 and 1996). Additional capacity is also required for counties and municipalities in Southern California to satisfy the legal requirements of AB 939 to demonstrate adequate waste disposal capacity. The solid waste capacity in southern California changes often due to a number of factors, including: (1) the closure of small, inefficient landfills as new regulations take

effect; (2) the development of larger regional sites; (3) the uncertainty of permitting efforts of new and expanded landfills; (4) litigation over land use issues of landfills and (5) the privatization of publicly owned landfills. These factors necessitate that cities and counties undertake long-term planning to ensure that adequate capacity is available.

The discussion below of waste capacity in the Southern California region is based on projected short-, medium-, and long-term needs. Future needs are based on several continuing and changing trends: (1) increase in population (California's population is expected to more than double from its current 30 million to more than 60 million by the year 2040 [California Department of Finance. 1993]); (2) expanded waste diversion and recycling, which is reducing the amount of material being disposed of in landfills; and (3) landfill closures and development proposals that will affect future disposal capacity.

1.3.1.1 Waste Diversion

In September 1989, the California Integrated Waste Management Act (AB 939) was signed into law. Among other provisions, AB 939 requires each city and unincorporated county area to prepare a Source Reduction and Recycling Element (SRRE) describing how it will meet solid waste diversion goals of 25 percent by the year 1995 and 50 percent by the year 2000. All California cities and unincorporated county areas have prepared and submitted their SRREs to the CIWMB. AB 939 also requires that these jurisdictions have a minimum of 15 years of waste disposal capacity. Preliminary

assessments made by the CIWMB indicate that most jurisdictions will meet or come close to meeting the 1995 diversion goals of 25 percent. Since 1990, per capita waste generation has declined from 7.9 pounds per day to 5.9 pounds per day (*Toward Ensuring Adequate Landfill Capacity, Integrated Waste Management Planning Study*, May 1995). Much of this decrease is attributable to increased source reduction, recycling and composting activities, and a prolonged statewide economic recession.

1.3.1.2 Disposal Capacity Requirements

In 1992, the CIWMB reported that there was a critical landfill capacity shortfall, with 70 percent of California's counties expected to have fewer than 15 years of remaining disposal capacity. Ten of the counties that comprise approximately 40 percent of the state's population had fewer than 5 years of landfill disposal capacity.

The projected disposal shortages in capacity have been slightly alleviated in the short term due to repermitting and expansion of some existing landfills and an overall 20 percent statewide reduction in disposal from 42.5 million tons in 1990 to 34 million tons in 1993. As discussed below, there is still, however, a need for additional disposal capacity, especially in Southern California. Even if all cities and the unincorporated county areas in Southern California comply with AB 939 requirements and divert 50 percent of their waste from landfills by the year 2000, six counties in Southern California (Riverside, Los Angeles. San Bernardino, Santa Barbara, San Diego, and Ventura) will still have

fewer than 15 years of fully permitted disposal capacity (from existing facilities and permitted expansions). Only the Counties of Orange and Imperial have at least 15 years of existing permitted disposal capacity, as required by AB 939 (see Section 1.3.2.1):

The disposal capacity requirements for the Counties of Riverside, San Bernardino, Los Angeles, Orange, Santa Barbara, San Diego, and Ventura are presented in the following sections for three periods of time: short term (1995 to 2000), medium term (1995 to 2020) and long term (1995 to 2050). These requirements are based on information presented in the draft countywide siting elements for each of these counties to the year 2010, and these data are extrapolated for subsequent years (see Section 9, References). The documents on which this discussion of disposal capacity are based are:

- Los Angeles County, Draft Countywide Siting Element (January 1996)

- Orange County, Draft Countywide Siting Element (February 1995)

- Riverside County, Draft Countywide Siting Element (January 1996)

- San Bernardino County, Draft Countywide Siting Element (November 1995)

- Santa Barbara County, Draft Countywide Siting Element (April 1996)

- San Diego County, Draft Countywide Siting Element (August 1995)

- Ventura County, Draft Countywide Siting Element (August 1995)

These counties, which are the planned service area of the Eagle Mountain Landfill, are collectively referred to in this EIS/EIR as the "Region" or "seven-county Region." Various options being considered by decisionmakers in the respective counties for developing the required additional disposal capacity for each of the three time periods are discussed below. These options are detailed in the various counties' draft countywide siting elements. In this discussion, "local landfill disposal facilities" refer to facilities that would be primarily, if not totally, served by trucks. "Remote facilities" refer to landfill disposal facilities that would be primarily, served by rail because of longer haul distances.

Short-term Disposal Capacity Requirements. In the short-term period (1995 to 2000), most areas in the seven-county Region generally have sufficient available disposal capacity to meet their needs. Several counties and/or particular wastesheds (i.e., the collective areas where waste is generated) within a specific county could, however, have inadequate local disposal capacity to meet their needs, as discussed below.

Riverside County. Adequate permitted landfill capacity exists in the County of Riverside to meet its short-term needs. In the eastern portion of the County of Riverside, however, a shortfall in disposal

capacity could occur as early as the year 2002, particularly in the Coachella Valley area. The area is serviced by two landfills: (1) Coachella Landfill, which is anticipated to close in 1997 and (2) the Edom Hill Landfill, which is anticipated to close in the year 2002 if the waste stream from the soon-to-close Coachella and Mecca II landfills are diverted to Edom Hill Landfill and it does not receive a permit from the CIWMB and Regional Water Quality Control Board (RWQCB) for a 40-foot vertical expansion that will provide 4 years of additional capacity. The Coachella Valley Association of Governments (CVAG) has issued two requests for proposal (RFP) and received proposals. One is to build a transfer station and the other is to obtain necessary landfill capacity for up to 1,500 tons of waste per day. (CVAG comprises portions of the unincorporated County of Riverside and the municipalities of Palm Springs, Cathedral City, Rancho Mirage, Palm Desert, Indian Wells, La Quinta, Indio, Coachella, and Desert Hot Springs.) One of the closest potential sites for disposal of Coachella Valley waste is the proposed Eagle Mountain Landfill. The County is also examining the possibility of shipping waste from the Coachella Valley to the Badlands Landfill located in the western portion of the County, although this action could require a permit revision. A summary of the disposal bids submitted to CVAG is included in Appendix B.

San Bernardino County. San Bernardino County has overall adequate total landfill capacity to the year 2000. As discussed in the section on medium-term capacity, the valley area of the county,

which has 80 percent of the population, could run out of capacity as early as the year 2001.

Los Angeles County. By the year 2000, Antelope Valley, Azusa, BKK, Bradley West, Chiquita, Lancaster, Lopez, and Spadra landfills will have reached their permitted capacity or their permit to operate will have expired. These potential closures represent a loss of more than 40,000 tons per day of permitted disposal capacity. As noted in the Preliminary Draft of the Los Angeles County Countywide Siting Element (January 1996), "a daily disposal capacity shortfall of approximately 4,600 tons per day (6-day week) will be experienced by 1999. This shortfall would increase to nearly 18,000 tons per day (6-day week) upon expiration of the Puente Hills Landfill Conditions Use Permit in November 2003." This analysis considered: (1) Only the existing permitted disposal capacity; (2) full implementation of AB 939 waste diversion programs; and (3) the full use of the permitted disposal capacity available at the recently approved expansion of the Sunshine Canyon Landfill beginning July 1, 1996.

The shortage disposal capacity is especially acute for waste generated within the City of Los Angeles (City), which generates more than a third of the County's waste. As a result of previous legal disputes, the City is restricted from using three of the Los Angeles County-operated landfills (i.e., Puente Hills, Scholl Canyon, and Spadra). In addition, only a small portion of the City of Los Angeles that falls within the Calabasas wasteshed is authorized to use Los Angeles County's Calabasas Landfill. Consequently, the City depends primarily on the City-operated

Lopez Canyon Landfill and the privately operated Bradley West, BKK, and Chiquita Canyon Landfills for the disposal of up to 2 to 3 million tons of waste a year. As noted previously, all four of these landfills will have reached their permitted capacity or their permit to operate will have expired by the year 2000. Sunshine Canyon Landfill, with its expected reopening in mid-1966, will provide some of the needed disposal capacity for City-generated waste; but this additional capacity will be insufficient to meet total City short-term disposal needs.

Orange County. Orange County has adequate short-term disposal capacity. Because of its recent bankruptcy, Orange County has recently decided to allow importation of approximately 6,500 tons per day of waste from surrounding counties. Contracts have been signed, and waste is being or will soon be imported from the counties of San Diego and Los Angeles.

Santa Barbara County. By 1999, the County of Santa Barbara will have inadequate daily disposal capacity when Tajiguas and Foxen Canyon Landfills reach permitted capacity. Santa Barbara County is currently trying to obtain permits to expand Tajiguas Landfill. If the permit to expand Tajiguas Landfill is not obtained, Santa Barbara County could have a shortfall in disposal capacity of 600 tons per day by the year 2000.

San Diego County. Although the County of San Diego currently has adequate short-term disposal capacity, several cities in northern San Diego County are investigating alternative, remote disposal sites,

including out-of-state facilities because of high local disposal costs. Two cities are currently hauling their waste approximately 150 miles by truck to a landfill in Los Angeles County. One city is hauling waste to a landfill in La Paz County, Arizona.

Ventura County. Although Ventura County has adequate short-term disposal capacity, the western pan of the county will experience a 1,200-tpd shortfall of capacity as a result of the scheduled closure of Bailard Landfill in May 1997.

Summary of Short-term Disposal Capacity Requirements. In summary, the amount of waste, if any, that will be hauled to remote landfills in the short term is difficult to estimate. Many factors will determine where jurisdictions dispose of their waste, including: (1) the repermitting and expansion of local landfills, (2) the cost of local versus remote disposal, and (3) the possibility of intra-county transfer of waste. As noted in the Draft Countywide Siting Elements cited above, many of the counties in the Region have expressed interest in having the capability to dispose of waste in remote locations as a backup resource because: (1) there are numerous uncertainties associated with predicting precisely the availability of adequate landfill capacity, and (2) some existing landfills could be closed prior to the expiration of their permit due to noncompliance with environmental regulations and the high cost of compliance. In a draft report prepared by staff of the Southern California Association of Governments (SCAG, August 1995), the following strategic public policy action was recommended to facilitate the disposal of solid waste in Southern California: "Local

governments in Southern California should actively pursue a coordinated effort to cite one or more environmentally safe rail-haul solid waste sanitary landfills in the region, including the provision of the needed recycling and transfer facilities."

The following narrative was included in this report to justify the need for this public policy action:

"'Close-in' existing sanitary landfill sites are reaching capacity in much of the urbanized parts of the region and new environmentally and politically acceptable sites are becoming increasingly more difficult to find and put in operation. A number of rail-accessible sites are in various stages of development both within the region and in adjacent states. Some uncertainties exist about the future of solid waste rail-haul to other states, which point to the importance of in-state sites. In order for rail-haul sites to be successful economically, waste commitment agreements are an important ingredient that require a coordinated regional effort. Sanitary landfills need to be environmentally engineered to provide the safest level of protection. It is important that local governments and the private sector coordinate their actions to provide necessary recycling and transfer facilities to support waste-by-rail operations and that these efforts be closely tied to the timing of landfill beginning operations."

Medium-term Disposal Capacity Requirements. In the medium term (1995 to 2020), approximately 481 million tons of waste from the seven-county Region will require disposal. This estimate assumes that all cities and unincorporated county areas

achieve a 50 percent diversion of waste by the year 2000, as mandated by AB 939. A summary of the annual disposal requirements and the total amount of waste for the 25-year period for each of the seven counties is presented in Table 1-4. Waste requiring disposal could be reduced if communities exceed the 50 percent mandate for the amount of waste that is reduced, recycled, and composted.

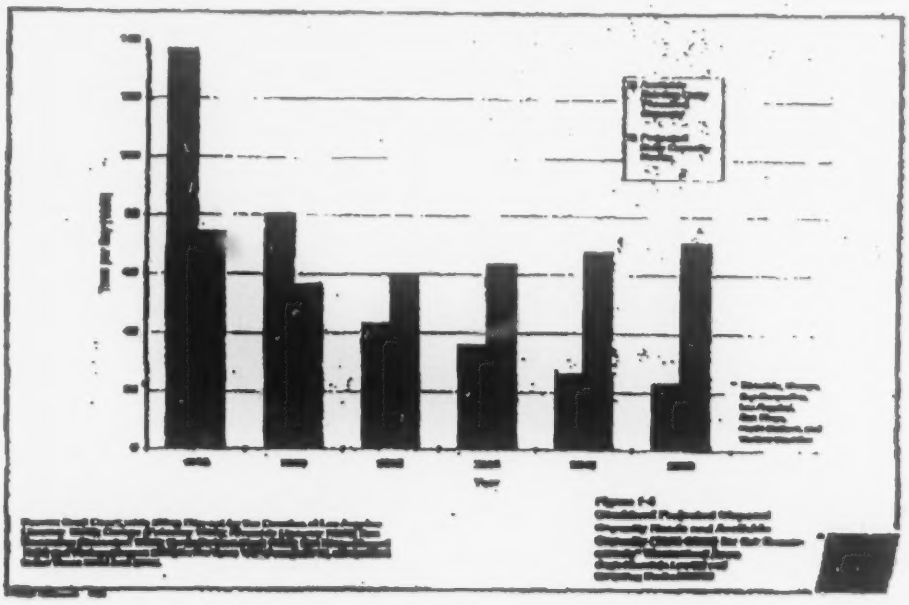

Figure 1-4

Based upon the projected disposal tonnages as presented in Table 1-4, there is inadequate existing permitted disposal capacity in the Region to meet its medium-term needs. As shown in Figure 1-4, a shortage in region wide daily permitted disposal capacity will occur sometime between the years 2000 and 2005 if no new capacity is obtained through repermitting or expansion of existing landfills or the

development of new landfill capacity. By the year 2020, approximately 48,000 tons per day of additional permitted disposal capacity will be required to meet the Region's needs. While, overall, there is a clear need for additional disposal capacity, the need varies considerably from county to county and within specific wastesheds in some counties. A discussion of the medium-term waste disposal capacity needs for each of the seven counties is presented below.

Table 1-4
Projected Waste Disposal of Seven-County Wasteshed

	Average Tons per Year* (millions)				Total Tons Years 1995 – 2000 (million tons)
County	Year 1995	Year 2000	Year 2010	Year 2020	
Los Angeles	11.7	8.6	9.9	10.9	226.0
Orange	3.9	2.8	2.9	3.0	74.8
Riverside	1.3	1.3	1.6	2.0	39.7
San Bernardino	1.5	1.3	1.3	1.5	35.4
Santa Barbara	0.6	0.4	0.5	0.6	13.0
San Diego	3.4	2.6	3.0	3.7	76.0
Ventura	0.8	0.6	0.6	0.7	16.5
Total	23.2	17.6	14.8	22.4	481.4
Daily Disposal Tons per Day 6 days/week	74,460	56,500	63,500	71,100	

*These figures assume that communities will meet the waste diversion requirements of AB 939 (i.e., 50 percent of waste generated will be diverted from landfills by the year 2000).

Source: Draft Countywide Siting Element for the Counties of Los Angeles (January 1996), Orange (February 1995), Riverside (January 1996), San Bernardino (November 1995), Santa Barbara (April 1996), San Diego (August 1995), and Ventura (August 1995) for the years 1995, 2000, 2010, and extrapolation for the year 2020.

Riverside County. Overall, the County of Riverside has adequate total disposal capacity to the year 2008. A shortage could occur, however, before this date because of the limits on daily permitted capacity. Additional capacity could be realized from the proposed expansions at Badlands, Lamb Canyon, Edom Hill, and El Sobrante Landfills. Although these

expansions, if approved, would provide the County with sufficient overall capacity in the medium term, there is a geographical disparity in landfill capacity (i.e., adequate capacity in the western County of Riverside and inadequate capacity in the eastern County of Riverside). As discussed previously, the Coachella Valley area of the county could experience a shortfall of landfill capacity by the year 2002. The CVAG is evaluating its options for long-term waste disposal, including disposing of waste at the Eagle Mountain Landfill, if this facility is developed.

San Bernardino County. The San Bernardino County Solid Waste Management Department estimates that San Bernardino County has approximately 10 years of disposal capacity available. The countywide average, however, is not a practical guideline because of the distance from the more populated valley area to the remote landfills located in the desert and mountain areas of the county. Although the desert area landfills have approximately 18 years of capacity, the valley landfills, which handle approximately 80 percent of San Bernardino County's waste, have only 6 years of available capacity based on the San Bernardino County Solid Waste Management Department estimates.

San Bernardino County is currently undergoing a countywide planning effort to determine its eventual, solid waste management system, which includes closing many of the smaller landfills, expanding three to seven of the existing landfills, and developing a new landfill in Victor Valley. Most of the proposed projects for increasing capacity have some local

opposition, and San Bernardino County has indicated in its Draft Countywide Siting Element that, if adequate local capacity cannot be developed, waste will be hauled by rail to existing out-of-state landfills or proposed in-state landfills, if they are developed.

Los Angeles County. As noted previously, Los Angeles County could have inadequate landfill capacity by the year 2000 to meet its daily disposal needs because of the likely closure of Azusa, BKK, Bradley, Lopez Canyon, and Spadra Landfills and the potential closure of Antelope Valley, Chiquita Canyon, and Lancaster landfills during the next 5 years. By the year 2010, because of the closure of additional landfills and increased population, the shortage in landfill capacity could reach 25,000 tons per day. By the year 2020, the shortage could exceed 31,000 tons per day, even if all cities meet their AB 939 diversion objectives and Sunshine Canyon Landfill is reopened.

Operators of several landfills are trying to extend or are considering extending their permits for several wars or expanding the capacity of the landfill (i.e., Antelope Valley, Chiquita Canyon, Lancaster, and Puente Hills landfills) to continue operation. Browning-Ferris Industries (BFI) has recently obtained rights from BKK to obtain permits to develop the proposed 190-million-ton Elsmere Canyon Landfill, which will have a daily capacity of 16,500 tons. Development of Elsmere Canyon is problematic because the federal lead agency for the Elsmere Canyon Landfill EIS, the U.S. Forest Service, has circulated a Draft EIS with a preferred alternative of "No Project." Even under the most

favorable of conditions (i.e., if all permits are received to extend or expand operation of existing landfills and if the Elsmere Canyon Landfill is opened), there will still be a shortfall in disposal capacity by the year 2020. Because of the difficulties and high costs associated with siting, permitting, and developing landfills, and the major environmental concerns of siting landfills near major urban areas, it is doubtful that needed disposal capacity to meet Los Angeles County's needs will be obtained through the development of new local landfills.

The Preliminary Draft of the Los Angeles Countywide Siting Element (Element) states "It is recognized that most (or all) of the sites identified may encounter strong opposition during the permitting process and that not all of the sites may be approved. Also, even if a site is successfully permitted, the total approved capacity and daily capacity may be less than projected in the Countywide Siting Element's analysis. Additionally, adequate reserve daily capacity should be provided to handle daily and seasonal variations in waste quantities as well as unanticipated disposal needs."

The Element further states "Jurisdictions throughout Los Angeles County have recognized that in the long term, out of County disposal may be necessary, even if most of the potential disposal capacity identified in the Countywide Siting Element is permitted."

In obtaining the permit to extend operations of Puente Hill Landfill to the year 2003, the County Sanitation Districts of Los Angeles County

committed in their certified EIR (County Sanitation Districts of Los Angeles County, USFS, and Los Angeles County Department of Regional Planning, January 1995) to export up to 4.000 tons of waste per day from Los Angeles County by the year 2005. The City of Los Angeles has also committed to the export of solid waste. In the adopted City of Los Angeles Solid Waste Management Policy Plan, dated April 1993, it is stated that "It is the policy of the City of Los Angeles that the City shall have the ability to transport either by rail or truck a portion of the waste requiring disposal after diversion to remote locations outside the County of Los Angeles, provided such disposal is environmentally safe, technically feasible, and publicly acceptable."

Orange County. With the opening of the Frank R. Bowerman Landfill (formerly Bee Canyon Landfill) in 1990, Orange County has adequate capacity to meet medium-term needs. By the year 2025, however, when the Frank R. Bowerman Landfill is expected to close, Orange County will have insufficient permitted available capacity to dispose of approximately 8,000 tons of waste a day. Orange County is currently not pursuing any options for developing additional landfill capacity and now allows the importation of out-of-county waste to generate additional funds because of the recent bankruptcy. This import of waste could slightly alleviate the disposal capacity shortfalls in some neighboring counties but will result in a shortfall in available disposal capacity to meet the needs of cities in Orange County before the year 2025. Without importing waste, adequate local disposal capacity

exists to meet Orange County's needs to the year 2020.

Santa Barbara County. As described previously, the County of Santa Barbara will have a shortfall in permitted daily disposal capacity of approximately 600 tons per day by the year 2000. Santa Barbara County is currently in the process of permitting the Phase I expansion of Tajiguas Landfill. Three other phases of expansion are planned. If all four phases of expansion of the Tajiguas landfill occur, Santa Barbara County will have sufficient landfill capacity to meet its medium-term and long-term needs. If additional capacity cannot be obtained, Santa Barbara County would be required to transport its waste to out-of-county disposal facilities as no other options are being pursued.

San Diego County. The County of San Diego will experience a shortfall in disposal capacity of approximately 2,000 tons per day by the year 2005, based on existing permitted capacity. By the year 2025, the shortfall will be approximately 10,000 tons per day. The City of San Diego is currently evaluating three sites for the potential of developing a landfill that could dispose of up to 4,800 tons per day for at least 25 years. If environmental review, land use approval, and permitting are completed by the year 2000, the preferred site would begin operations by the year 2005. The County of San Diego has identified potential sites for the development of one landfill in the north county area and one landfill in the south county area. The tentative schedule is to begin detail planning for the development of the

north county landfill in the year 2007 and the south county landfill in the year 2009. To meet the County's projected year 2020 disposal requirements, the permitting and development of the proposed City of San Diego landfill and at least one landfill in either the north or south county areas will be required. If these two landfills cannot be permitted and constructed, San Diego County would be required to use out-of-county disposal facilities for at least a portion of its waste.

Ventura County. Most of the County of Ventura's waste is currently disposed of in the Simi Valley Landfill and the Bailard Landfill in Oxnard. The Simi Valley Landfill's conditional use permit (CUP) expires in 2004, and the Bailard Landfill is expected to reach capacity in 1996. The only landfill with existing permitted capacity available for local disposal after the year 2004 is the Toland Road Landfill, which currently can accommodate less than 5 percent of Ventura County's waste. Ventura County is in the process of preparing an EIR to increase the capacity of the Toland Road Landfill. Because of the failure to site the Weldon Canyon Landfill, Ventura County is reviewing export of waste to out-of-county sites in addition to reviewing proposals by private vendors to expand existing landfills or develop new in-county landfills to meet its disposal needs.

Summary of Medium-term Disposal Capacity Requirements. With the exception of the County of Orange, there is inadequate existing disposal capacity to meet each of the counties' medium-term needs. As indicated in Figure 1-4, the shortage in disposal capacity in the Region could reach 48,000

tons per day by the year 2020. Some of the needed increase in disposal capacity could result from repermitting and expanding the capacity of existing landfills. For the majority of these landfills, this will extend their life by 10 or fewer years. Even if all proposed repermitting or expansions of existing landfills were approved, which is unlikely, there still will be a shortage in the seven-county region in disposal capacity of over 20,000 tons per day by the year 2020.

Another option for obtaining additional disposal capacity is siting, developing, and permitting new local landfills. Several counties are considering developing new local disposal capacity. Only one site located in Los Angeles County (Eismere Canyon), however, has initiated an extensive environmental review process. Even if this landfill is developed, Eismere Canyon would only partially solve Los Angeles County's disposal requirements; and a shortfall in disposal capacity would still occur in Los Angeles County before the year 2020. With the exception of new landfills in San Diego County, the other new landfills being considered will service only small outlying urban and rural areas.

The only other waste disposal option for most of the counties (even after recycling, source reduction, and other waste diversion) is transporting waste by rail to remote disposal facilities. As discussed in Section 1.3.2.3, there are several out-of-state landfills that currently exist and two in-state Southern California landfills in addition to Eagle Mountain currently in the permitting stage that have the capabilities to accept waste by rail.

Long-term Disposal Capacity Requirements. Over the long term (1995 to 2050), approximately 1.3 billion tons of waste will require disposal from the seven-county Region. This estimate assumes that all cities and unincorporated areas achieve a 50 percent diversion by the year 2000. By the year 2050, the total daily disposal needs of the Region could reach 105,000 tons, which is equivalent to the daily disposal capacity limits of five to six developments the size of the proposed Eagle Mountain Landfill. Waste requiring disposal from the seven-county Region could be reduced if communities achieve greater diversion rates than what is currently mandated by the state. Existing local permitted capacity and additional local permitted capacity options currently being pursued by counties in the seven-county Region will accommodate only a small portion of the Southern California region's long-term disposal needs.

1.3.1.3 Remote Disposal Capacity

In addition to the proposed Eagle Mountain Landfill, there are two other remote landfills in Southern California currently in the process of obtaining the necessary approvals to accept waste. These two proposed landfills are the Rail Cycle-Bolo Station Landfill and the Mesquite Regional Landfill. Rail Cycle proposes to develop a waste-by-rail system at the proposed Bolo Station Landfill, located in eastern San Bernardino County, which would also accept up to 21,000 tons per day of solid waste for the next 60 to 100 years. The proposed Mesquite Regional Landfill, which is located in Eastern Imperial County, would also accept waste by rail

from other Southern California counties. The Mesquite Landfill would have the capacity to accept up to 20,000 tons a day for the next 100 years. These proposed landfills are discussed in more detail in Section 2.8.3.

In addition to the three proposed remote landfills in Southern California (Eagle Mountain, Bolo Station, and Mesquite Landfills), there are several out-of-state regional landfills in the western United States. These include La Paz County Landfill in Parker, Arizona; Butterfield Station Landfill in Phoenix, Arizona; East Carbon Canyon Landfill in eastern Utah; Columbia Ridge Landfill in Arlington, Oregon; and Roosevelt Landfill in the State of Washington. Most of these landfills have large capacities and would be willing to accept waste from Southern California. Although these out-of-state landfills could provide short-term solutions to communities that have no immediate alternative, it is uncertain that they will provide a dependable long-term solution to the Region's disposal needs for the following reasons:

- Although these landfills have the capability to service large areas including most of the western and central United States, the cost of transporting waste to out-of-state landfills increases proportionately with the distance from the source of the waste.

- Many jurisdictions, in Southern California, including CSDLAC, have indicated the desire to haul to sites in the state.

- Some of the out-of-state disposal facilities (i.e., La Paz and Butterfield) currently do not have direct-rail access.

- Federal laws and regulations are continuously in flux: future new regulations and/or amendments to existing laws could affect long-term accessibility to out-of-state sites.

- Many of the out-of-state facilities have not undergone the extensive environmental reviews that are required for landfills in the State of California. Disposing of waste in these facilities might not be politically or environmentally acceptable.

- Special export fees are being considered by the State of California to offset the loss of disposal fees needed by the state to monitor solid waste regulatory compliance and fund waste reduction efforts, which could further increase the cost of remote rail-haul disposal.

In the short term, at least, one rail-haul landfill facility will be needed to ensure that adequate alternative disposal sites are available for those jurisdictions in the Region that could encounter a shortfall in disposal capacity during the next 5 years. For the following reasons, more than one site could be developed to: (1) ensure competitive disposal pricing, (2) provide redundancy in the instance that one facility must prematurely or temporarily close, (3) provide excess disposal capacity to ensure adequate capacity in the event of natural disasters and other emergencies resulting in the creation of

additional demand for disposal capacity, and (4) ensure competition by more than one rail line and to facilitate competitive pricing for waste transport. In addition, if a cost-effective remote disposal option were available, some jurisdictions could choose to use these landfills to conserve local landfill capacity or close existing landfills that are either costly to operate or are in noncompliance with environmental regulations.

By the year 2020, two or three rail-haul disposal facilities could be required, each with a disposal capacity of up to 20,000 tons per day of waste, to meet projected disposal requirements. In addition to these additional facilities, other rail haul facilities could be required for the long term unless new disposal technologies are developed for the environmentally safe and cost-effective disposal of waste and/or significant decreases in per capita generation of waste.

The Project applicant, MRC has had discussion with various private companies about transporting waste from any of the seven counties who have expressed potential interest to use the Eagle Mountain Landfill under a long-term contract arrangement. In addition, MRC has had discussions with various Southern California cities, counties, and sanitation districts concerning long-term commitment of solid waste flow to the site. These discussions have included the County of Riverside Waste Resources Management District, Los Angeles County Sanitation Districts, the City of Los Angeles, San Diego County, San Bernardino County, and Ventura County. MRC and Kaiser have also had

discussions regarding selling a portion of the landfill, by way of equity or air space, to both private companies and government entities. In the future, these discussions could result in one or more agreements for commitment of waste, selling of equity, operating, or selling of air space to occur.

No. 10-548

In the Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC., ET AL., PETITIONERS

v.

NATIONAL PARKS & CONSERVATION ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in setting aside the Bureau of Land Management's decision regarding a land exchange and remanding for further administrative proceedings.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1-97) is reported at 606 F.3d 1058. The opinion of the district court (Pet. App. 98-137) is unreported.

JURISDICTION

The amended judgment of the court of appeals was entered on May 19, 2010, and a petition for rehearing was denied on July 30, 2010 (Pet. App. 275-279). A petition for a writ of certiorari was filed on October 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Land Policy and Management Act of 1976 (Management Act), 43 U.S.C. 1701 *et seq.*, autho-

rizes the Secretary of the Interior to "dispose[] of" "[a] tract of public land or interests therein * * * by exchange" if the Secretary "determines that the public interest will be well served by making that exchange" in light of various factors identified in the statute. 43 U.S.C. 1716(a). The Secretary delegated his responsibilities under the Management Act to the Bureau of Land Management (BLM). 43 U.S.C. 1731. The Department of the Interior has promulgated regulations governing BLM's review and analysis of proposed land exchanges. See generally 43 C.F.R. Pt. 2200.

The Management Act provides that the values of lands exchanged "shall be equal, or if they are not equal, the values shall be equalized by the payment of money." 43 U.S.C. 1716(b). For the purpose of exchanges, land is valuated based on market value as determined by BLM through land appraisals. 43 C.F.R. 2200.0-6(c). The multipronged valuation process includes BLM's consideration of the "[h]ighest and best use" of the selected public lands. 43 C.F.R. 2200.0-5(k). Highest and best use is defined as "the most probable legal use of a property, based on market evidence as of the date of valuation, expressed in an appraiser's supported opinion." *Ibid.*

Parties aggrieved by a BLM decision on a proposed land exchange may appeal that decision to the Department of the Interior's Board of Land Appeals (Appeals Board). 43 C.F.R. 4.410. The administrative appellant must file with the Appeals Board a "statement of reasons" for the appeal and "written arguments or briefs." 43 C.F.R. 4.412(a). A decision of the Appeals Board constitutes final agency action. 43 C.F.R. 4.403.

b. Land exchanges governed by the Management Act are also subject to the requirements of the National

Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* See 43 C.F.R. 2200.0-6(h). NEPA requires that, whenever a federal agency proposes a "major Federal action[] significantly affecting the quality of the human environment," the agency must examine the reasonably foreseeable environmental effects of the proposed action and inform the public about its effects on the environment. 42 U.S.C. 4332(2)(C); 40 C.F.R. Pt. 1508; see *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 97 (1983). In so doing, the agency must prepare a "detailed statement" of the environmental impact of the proposed action—an "environmental impact statement" (EIS)—the requirements of which are set out in the regulations implementing NEPA. 42 U.S.C. 4332(2)(C); 40 C.F.R. Pts. 1502, 1508. Those regulations provide, *inter alia*, that an EIS "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. 1502.13. Although NEPA itself does not address or set forth any requirements governing the purpose-and-need statement, it does require that an EIS include "alternatives to the proposed action." 42 U.S.C. 4332(2)(C)(iii). The regulations require that an EIS "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. 1502.14(a).

NEPA "does not mandate particular results, but simply prescribes the necessary process." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA's "mandate to the agencies is essentially procedural" and is designed "to insure a fully informed and well-considered decision" on the part of the fed-

eral agency. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978).

2. This case concerns a land exchange between BLM and petitioners Kaiser Eagle Mountain, Inc., and Mine Reclamation Corporation. Petitioners owned an iron ore mine in California and operated it from 1948 to 1983. Pet. App. 5. The mine area covered more than 5000 acres and included four large open pits. *Ibid.* The disturbed land contains large quantities of mine tailings and has not been reclaimed. *Ibid.* The United States owns a reversionary interest in some of the land used by petitioners in operating the mine. *Ibid.*

BLM manages several parcels of public land surrounding the former mine site. Pet. App. 5. In 1989, petitioners sought to acquire those parcels through a land exchange with BLM pursuant to the Management Act. *Ibid.* Petitioners proposed to acquire those parcels of federally owned land surrounding the mine site in order to construct a nonhazardous municipal-waste landfill. *Id.* at 5-6. Pursuant to the exchange (which was effectuated in 1999), BLM received a cash payment and 2846 acres of private land. *Ibid.* The acquired private lands consolidate public landholdings administered by BLM and place under federal management environmentally sensitive lands, including an area designated by the United States Fish and Wildlife Service as critical habitat for the threatened desert tortoise. Gov't Opening C.A. Br. 6. Under petitioners' proposal, all of the offered private lands will become part of the California Desert Conservation Area, pursuant to 43 C.F.R. 2200.0-6(f). Gov't Opening C.A. Br. 6. In return, BLM transferred to petitioners 3481 acres of fragmented parcels of mostly mountainous public land surrounding the open pits left over from petitioners' former mining oper-

ation; a grant of two rights-of-way; and the conveyance of the United States' reversionary interest to lands in the area of petitioners' former mining operation. *Ibid.*; Pet. App. 5-6.

In 1992, BLM and the County of Riverside (the lead State agency, under the California Environmental Quality Act) issued a joint federal Environmental Impact Statement/California State Environmental Impact Report (EIS/EIR), analyzing the proposed land exchange and landfill project. Gov't Opening C.A. Br. 7; Pet. App. 102. In January 1997, following a state court challenge to the joint document, the release of a new draft document, and four public hearings, BLM and the County of Riverside issued a final EIS/EIR and approved the proposed project. Gov't Opening C.A. Br. 8; Pet. App. 102-103. BLM's approval of the land exchange included its approval of an expert land appraisal for the public and private lands that were to be exchanged (the Yerke appraisal). Pet. App. 7-8, 103. On September 25, 1997, BLM issued a Record of Decision (ROD) approving the land exchange with petitioners. *Id.* at 8, 104. The private respondents in this Court (respondents), National Parks Conservation Association and Donna and Laurence Charpied, filed protests with BLM challenging the ROD and they subsequently appealed to the Appeals Board when BLM denied the protests. *Id.* at 8. In September 1999, the Appeals Board issued a written opinion affirming BLM's decision. *Id.* at 8, 138-202. In October 1999, the land exchange was effectuated by the filing of grant deeds with the County Recorder. *Id.* at 104.

3. a. In December 1999 and January 2000, respondents filed separate suits in the district court against BLM and the Department of the Interior, alleging viola-

tions of the Management Act and NEPA and seeking declaratory and injunctive relief. Pet. App. 8, 100. The district court consolidated the suits. *Id.* at 8. While the consolidated cases were pending, the Ninth Circuit issued its decision in *Desert Citizens Against Pollution* v. *Bisson*, 231 F.3d 1172, 1180-1187 (2000) (*Desert Citizens*), addressing, *inter alia*, the Management Act's requirements governing analysis of the highest and best uses of lands proposed for a land exchange. Respondents moved for summary judgment, relying on the decision in *Desert Citizens* to argue that BLM's appraisal was inadequate because the "highest and best use" analysis for the market-value determination did not consider a landfill as a potential use of the public lands chosen for exchange, and submitting their own new appraisal of the land. See Pet. App. 118, 302. In response, BLM retained an independent real estate appraisal expert to prepare a report (the Herzog report) that, among other things, conformed to the Uniform Appraisal Standards for Federal Land Acquisitions and complied with the requirements described in *Desert Citizens*. See *id.* at 301-334; *id.* at 19 n.5. BLM approved the Herzog report, formally added it as a supplement to the administrative record, and submitted it to the district court as an attachment to BLM's joint summary judgment motion with Kaiser. See *id.* at 301-334.

In 2005, the district court issued an unpublished opinion granting in part and denying in part the cross-motions for summary judgment. Pet. App. 98-137. The court rejected the government's contention that respondents had not administratively exhausted their Management Act claims concerning BLM's analysis of the highest and best use of the exchanged public lands, and did not expressly decide whether they had exhausted their

NEPA claims concerning BLM's purpose-and-need statement and range-of-alternatives analysis. *Id.* at 105-108. On the merits of the Management Act claims, the district court concluded that BLM's Yerke appraisal of the land at issue violated the Management Act and the Ninth Circuit's prescriptions in *Desert Citizens*, *supra*, by failing to consider a landfill as a potential highest and best use for the public lands selected for exchange. *Id.* at 117-120. In so finding, the court did not consider either respondents' appraisal or the Herzog report filed with the parties' summary judgment motions. On the merits of the NEPA claims, the court found that BLM erred by defining the purpose and need of the land exchange "so narrowly * * * that *only* the proposed land exchange and land interest grants could accomplish the agency's goals." *Id.* at 132-133. The court further concluded that, because the purpose-and-need statement was too narrow, BLM did not consider a reasonable range of alternatives for the proposal. *Id.* at 135. The district court remanded to BLM and set aside the land exchange, pending BLM's preparation of an EIS and ROD consistent with the court's order. *Id.* at 136-137.

b. The government and petitioners appealed, and respondents Donna and Laurence Charpied cross-appealed. A divided panel of the court of appeals issued a decision on November 11, 2009, and a revised decision on May 19, 2010, affirming in part, reversing in part, and remanding for further proceedings. Pet. App. 1-97.[1]

As to respondents' Management Act claims, the majority of the panel rejected the government's argument

[1] Citations to the court's decision are to the revised opinion issued on May 19, 2010, which is included in the appendix to the petition for a writ of certiorari.

that respondents failed to administratively exhaust their challenge to BLM's "highest and best use" analysis, finding that the Appeals Board received "sufficient notice" to allow the agency to respond to the issue. Pet. App. 12-15. On the merits, the majority found that BLM's initial "highest and best use" analysis should have examined the "reasonably probable use" of the exchanged lands as a landfill. *Id.* at 20. The majority declined to consider whether the Herzog report cured this deficiency because the report post-dated the challenged agency decision. *Id.* at 19 n.5.

With respect to respondents' NEPA claims, the majority did not address whether the challenges to BLM's purpose-and-need and range-of-alternatives analyses had been properly raised in and exhausted through the administrative process. On the merits of those claims, the panel majority held that the purpose-and-need statement in the EIS was deficient because three of the four goals identified therein "respond to [petitioners'] goals, not those of the BLM." Pet. App. 24; see *id.* at 23-29. The majority concluded that BLM's "narrowly drawn" purpose-and-need statement "necessarily and unreasonably constrain[ed] the possible range of alternatives" considered by BLM. *Id.* at 28. The majority further held that the EIS's analysis of atmospheric eutrophication was inadequate because it was presented in a "patchwork" manner that could not "serve as a 'reasonably thorough' discussion" of the issue. *Id.* at 31-33.

Judge Trott filed a separate opinion dissenting from the panel majority's. Pet. App. 35-97. Judge Trott would have held that the EIS's purpose-and-need statement, consideration of alternatives, and discussion of eutrophication satisfied the requirements of NEPA. *Id.* at 44-79. With respect to respondents' "highest and

best use" claims under the Management Act, Judge Trott would have held that respondents failed to administratively exhaust those claims, *id.* at 80-90, and that the Herzog report cured any inadequacies in BLM's initial "highest and best use" analysis, *id.* at 90-96.

ARGUMENT

Petitioners ask this Court to review the decision of the court of appeals to remand this case to BLM for further administrative proceedings after the court found violations of the Management Act and NEPA. Although the government agrees with petitioners that the court of appeals erred in remanding the case—as well as in finding violations of the Management Act and NEPA—further review by this Court is not warranted, because the court of appeals' decision is fact-bound and does not squarely conflict with any decision of this Court or of any other court of appeals.

Petitioners' primary contention (Pet. 18) is that the court of appeals' decision to remand to the agency to correct violations of the Management Act and NEPA was error because there is no "substantial prospect that the agency's decision will change as a result" of the remand. The Administrative Procedure Act (APA), 5 U.S.C. 706, admonishes that, when a court reviews agency action, "due account shall be taken of the rule of prejudicial error." Although a court ordinarily should remand to an agency when it determines that the administrative record does not support the agency action under review, *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985), under the prejudicial-error rule, a remand is not required if a perceived error "could have had no effect on the underlying agency action being challenged," *National Ass'n of Home Builders* v. *Defenders*

of Wildlife, 551 U.S. 644, 659 (2007) (*Home Builders*). Petitioners ask this Court to review the court of appeals' application of the prejudicial-error rule to the perceived violations of the Management Act and NEPA.[2]

1. Review by this Court of the court of appeals' decision to remand to BLM for correction of what the court viewed as a violation of the Management Act is not warranted, because the decision involves the fact-bound application of the proper legal standard. Petitioners contend (Pet. 19-24) that the APA's instruction that courts reviewing agency action take account of "the rule of prejudicial error" prohibits a court that finds error in an agency's action from remanding to the agency for further proceedings, if such a remand is likely to produce the same result. However, the court of appeals in this case did not identify anything in the administrative record underlying the agency decision under review that indicated a likelihood that BLM would have reached the same conclusion had it undertaken a "highest and best use" analysis in keeping with the requirements subsequently announced in *Desert Citizens Against Pollution* v. *Bisson*, 231 F.3d 1172, 1180-1187 (9th Cir. 2000) (*Desert Citizens*). It is true that the agency revisited its original "highest and best use" analysis after the decision in *Desert Citizens*—resulting in the Herzog report —but the court of appeals refused to consider that report because it "was not before either the BLM or the

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[2] Petitioners do not seek review of the court of appeals' determination that respondents administratively exhausted their Management Act and NEPA claims. Nor do petitioners seek review of the merits determinations that BLM's final decision violated the Management Act and NEPA. Although the government disagrees with the court of appeals' resolution of those issues in various respects, those issues are not presented in the petition for a writ of certiorari.

Appeals Board" when they made the decisions under review. Pet. App. 19 n.5. Moreover, even if the court of appeals had considered the Herzog report in applying the prejudicial-error rule to evaluate the decision under review, the court determined that it was "hardly" clear that, in obtaining the report, the agency had "cured the Management Act deficiencies of the Yerke appraisal 'on a basis that could not be successfully challenged.'" Pet. App. 19 n.5 (quoting *Friends of the Clearwater* v. *Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000)). Thus, the court of appeals did not reject the principle advanced by petitioners that remand is not appropriate when it is clear that the outcome of the agency's action will not change. The court of appeals' fact-specific application of the prejudicial-error rule to this case does not merit review by this Court.[3]

Petitioners acknowledge (Pet. 21) that this Court "has not considered the circumstances in which supposed errors in EISs require vacating agency action and remanding for further proceedings," but rely (Pet. 20-24) on various court of appeals decisions, some of which involve review of EISs and some of which do not, in support of their argument.

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[3] The Ninth Circuit recently held—relying on this Court's decision in *Shinseki* v. *Sanders*, 129 S. Ct. 1696 (2009)—that the party challenging agency action bears the burden of demonstrating the existence of prejudicial error. *California Wilderness Coalition* v. *United States Dep't of Energy*, No. 08-71074, 2011 WL 294087, at *10-*13 (Feb. 1, 2011). It is not clear in the instant case whether the court of appeals allocated that burden appropriately. But petitioners do not challenge the court of appeals' decision on that basis, and the court's conclusion that it could not determine whether the agency's final decision would have been the same absent the putative errors provides a sufficient basis for this Court to deny further review.

Based on the administrative record, those decisions looked to whether a particular agency error affected the agency decision under review. Those decisions therefore are consistent with this Court's statements in *Home Builders*, 551 U.S. at 659, that errors that "could have had no effect on the underlying agency action being challenged" are not "the type of error that requires a remand." They did not address the different question, which petitioners seek to raise, of whether a remand would be appropriate based on a prediction about whether further proceedings to correct an identified error would yield a different result.

For example, in *Nevada* v. *Department of Energy*, 457 F.3d 78, 90-91 (2006), the D.C. Circuit held that the agency's failure to identify its preferred alternative by name in its final EIS was harmless because the public had sufficient information to comment on the various available alternatives (including the agency's preferred alternative) in the EIS, and because the agency subsequently identified its preferred alternative, permitting the public to comment on that alternative specifically. Thus, any failure by the agency did not undermine "NEPA's goal of ensuring that relevant information is available to those participating in agency decision-making" and did not affect the agency's final decision. *Ibid.* The other court of appeals decisions on which petitioners rely (Pet. 20-24) included similar circumstances. See *United States Telecom Ass'n* v. *FCC*, 400 F.3d 29, 40-42 (D.C. Cir. 2005) (agency's failure to label rule-making process as notice-and-comment did not require remand because any error did not affect the outcome of the agency's decision); *Save Our Heritage, Inc.* v. *FAA*, 269 F.3d 49, 61-62 (1st Cir. 2001) (NEPA violation was not prejudicial because agency did analyze environmen-

tal effects of proposed action); *Dantran, Inc.* v. *United States Dep't of Labor*, 171 F.3d 58, 73-74 (1st Cir. 1999) (declining to remand because administrative record established that error in agency decision-making did not affect outcome); *Friends of the Boundary Waters Wilderness* v. *Dombeck*, 164 F.3d 1115, 1129-1130 (8th Cir. 1999) (reliance on some data that may have been flawed did not violate NEPA because there was not a significant chance that any error affected agency's decision); *Glisson* v. *United States Forest Serv.* 138 F.3d 1181, 1183 (7th Cir.) (possible oversight in Environmental Assessment did not require reversal because agency's decision would have been the same without the possible oversight), cert. denied, 525 U.S. 1022 (1998); *Sierra Club* v. *Slater*, 120 F.3d 623, 637 (6th Cir. 1997) (technical failure that had no bearing on ultimate decision not a basis for reversal); *Fisher* v. *Bowen*, 869 F.2d 1055, 1057 (7th Cir. 1989) (ALJ's decision was supported by substantial evidence notwithstanding decision's "vulnerab[ilities]"); *Illinois Commerce Comm'n* v. *ICC*, 848 F.2d 1246, 1257-1258 (D.C. Cir. 1988) (agency's failure to prepare Environmental Assessment was not prejudicial because agency did consider environmental consequences during rule-making and would be required to do so in future individualized proceedings), cert. denied, 488 U.S. 1004 (1989); *NLRB* v. *American Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982) (remand required only if "there is a significant chance that but for the error, the agency might have reached a different result"), cert. denied, 461 U.S. 906 (1983).

Petitioners do not identify any decision holding that a reviewing court is *prohibited* from remanding for further proceedings upon finding error in an agency decision in circumstances such as those present here.

Nor does anything in the court of appeals' discussion of respondents' Management Act claims conflict with any other court of appeals' application of the APA's prejudicial-error rule. Accordingly, further review of the court of appeals' fact-specific application of the prejudicial-error rule is not warranted.

2. For the same reasons, the court of appeals' application of the prejudicial-error rule to respondents' NEPA claims does not warrant review by this Court. In holding that BLM's EIS violated NEPA with respect to the purpose-and-need statement and the range-of-alternatives analysis, the court of appeals indicated that it could not determine whether the identified errors affected the outcome of the agency's final decision. The court concluded that BLM's definition of the project's purpose—a definition the court viewed as overly narrow—"will necessarily affect the range of alternatives considered." Pet. App. 27; see *id.* at 28 ("Such a narrowly drawn [purpose-and-need] statement necessarily and unreasonably constrains the possible range of alternatives."). Although the government disagrees with the court's conclusions that the purpose-and-need statement was too narrow, and that the agency failed to consider an appropriately broad range of alternatives, the court's decision to remand for further proceedings after drawing such conclusions does not conflict with other courts' applications of the prejudicial-error doctrine.[4]

The same is true with respect to the eutrophication issue. The court indicated, based on the manner in which the EIS discussed eutrophication (*i.e.*, dispersed throughout the document rather than collected in one

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[4] As noted above, petitioners' question presented does not challenge the merits of the court of appeals' finding of a NEPA violation.

section), that it was not clear whether the identified error affected the outcome of the agency's final decision. The court concluded that BLM's "EIS contains no specific discussion of eutrophication" and that the discussion that it did provide was "neither full nor fair with respect to atmospheric eutrophication." Pet. App. 31-32. Again, although the government takes issue with the court's conclusion regarding the adequacy of the EIS, the court's determination that remand was appropriate in light of that conclusion does not conflict with other courts' application of the prejudicial-error rule.[5] Thus, the court of appeals' fact-bound application of the APA's prejudicial-error rule does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2011

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[5] Moreover, petitioners failed to present a prejudicial-error argument to the court of appeals with regard to the NEPA issues. This Court "generally declines to review issues not pressed or passed upon by the lower courts." Eugene Gressman et al., *Supreme Court Practice* § 6.26(b), at 465 (9th ed. 2007) (emphasis omitted); see also *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

No. 10-548

FEB 25 2011

In The
Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC.,
AND MINE RECLAMATION CORPORATION,

Petitioners,

v

NATIONAL PARKS &
CONSERVATION ASSOCIATION, *ET AL.*,

Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS DONNA CHARPIED, *ET AL.* IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the issue of harmless error, an issue never raised by any party in the Ninth Circuit, is appropriate for review by this Court.

2. Whether the Ninth Circuit's holding that the Bureau of Land Management (BLM) used a legally inadequate appraisal to justify a land exchange under the Federal Land Policy and Management Act (FLPMA) is adequate grounds for remand to the agency.

3. Whether the Ninth Circuit's determination that BLM failed to analyze an adequate range of alternatives under the National Environmental Policy Act (NEPA) is adequate grounds for remand to the agency.

4. Whether the Ninth Circuit's determination that BLM failed to take a "hard look" at a project's impacts pursuant to NEPA is adequate grounds for remand to the agency.

PARTIES TO THE PROCEEDING BELOW

In addition to the parties listed in the caption, the following were parties in the court of appeals:

Donna Charpied; Laurence Charpied; Desert Protection Society; Center for Community Action and Environmental Justice; Bureau of Land Management; United States Department of Interior; National Park Service; Bruce Babbitt, in his official capacity as Secretary of the Interior; Tom Fry, in his official capacity as Acting Director of the Bureau of Land Management; Al Wright, in his official capacity as Acting California State Director of the Bureau of Land Management; Tim Salt, in his official capacity as Bureau of Land Management California Desert District Manager; Robert Stanton, in his official capacity as Director of the National Park Service.

RULE 29.6 STATEMENT

Desert Protection Society and Center for Community Action and Environmental Justice represent that neither has a parent corporation and no publicly held corporation owns any interest in either of them.

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STATEMENT OF THE CASE

In September 1997, the Bureau of Land Management ("BLM") issued a Record of Decision ("ROD") in which it approved petitioners Kaiser Eagle Mountain, *et al.*'s (collectively "Kaiser's") development of a 4,654-acre landfill directly adjacent to Joshua Tree National Park (Joshua Tree). Appendix to Petition for a Writ of Certiorari ("Pet. App.") E Accepting trash six days a week, for up to 16 hours each day, the dump as approved would receive a total of 708 million tons of garbage in its 117-year life span. Pet. App. 6. Joshua Tree cradles the site on three sides, is separated from the proposed dump by a mere one-and-a-half miles, and includes viewsheds that look directly into the proposed dump. *Id.*

Joshua Tree is a 794,000-acre national park that has been declared an International Biosphere Reserve by the United Nations. It is a designated Class I airshed under the Clean Air Act and provides important habitat for bighorn sheep, desert tortoises, deer, coyotes, bobcats, mountain lions, and numerous species of birds and reptiles. Pet. App. 101. In 1994, citing the need to protect Joshua Tree from "incompatible development and inconsistent management of . . . contiguous Federal lands of essential and superlative natural, ecological, archeological, paleontological, cultural, historical, and wilderness values," Congress affirmed Joshua Tree's status as a nationally significant area by designating it a National Park. 16 U.S.C. § 410aaa-21(3) (2007). In Congress' own words, Joshua Tree is "a public wildland resource of extraordinary

and inestimable value for this and future generations." *Id.*

As a part of the development plan for its landfill on the borders of Joshua Tree, Kaiser proposed a land exchange with BLM. Pet. App. 5-6. To facilitate this proposal, BLM commissioned an appraisal from David J. Yerke, Inc. ("Yerke appraisal") to evaluate the value of the exchanged lands. The Yerke appraisal explicitly disregarded the proposed use of the exchanged lands when making its assessment, stating "that it did 'not take into consideration any aspects of the proposed landfill project'" when evaluating the highest and best use for the land. Pet. App. 7. This resulted in an appraisal of the public lands in question at a value *less than 1%* of what they are actually worth. Pet. App. 8.[1]

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[1] As the Ninth Circuit highlighted in its opinion, the Yerke appraisal valued the land at $77 an acre, while the Los Angeles County Sanitation District "has since entered into a conditional agreement to purchase the landfill property and permits for over $8,800 per acre." Pet App. 8, fn. 1. In response, *amicus curiae* County Sanitation District No. 2 of Los Angeles County (LA Sanitation) claims that the $8,800 price per acre reflects the price for a "fully permitted project, free of litigation." LA Sanitation *Amicus* Brief, 5, fn. 2. This response, however, fails to address the appraisal's fundamental flaw, "the appraiser's wilful ignorance" that the land would be used as a landfill and therefore had a significantly higher value than empty desert acreage. Pet. App 18. Even discounting the purported "fully permitted" component of the deal, LA Sanitation's desire to purchase the landfill property at a price over *100 times higher* than $77 demonstrates that the Yerke appraisal's refusal to consider landfill use of the land was unreasonable.

In July 1996, BLM released a Draft Environmental Impact Statement ("DEIS") addressing the proposed landfill. The National Park Service ("NPS") was designated a "cooperating agency" with "special expertise" for purposes of BLM's NEPA review of the landfill. Appendix to Brief for Respondent Donna Charpied, *et al.* in Opposition ("Charpied App.") 2; *see* 40 C.F.R. § 1508.5. During NPS's initial review, it called on BLM to reject the proposal, stating its preference for the "No Action Alternative." Charpied App. 8. Specifically, NPS determined that: (1) eutrophication, public health and safety, impacts to the desert tortoise and bighorn sheep, vectors and disease, wilderness and the wilderness experience, and air quality are all significant impacts of the dump that *cannot be adequately mitigated* (Charpied App. 10-15); (2) the alternatives analysis was woefully inadequate (Charpied App. 7-8); and (3) "the FEIS/EIR must reference that the possibility exists for *significant, irreversible environmental changes* at Joshua Tree National Park" (Charpied App. 15, emphasis added). These comments were produced "by specialists at Joshua Tree National Park, System Support Office, Field Director's Office, National Resource Program offices, and Washington levels," as part of NPS' obligations as a cooperating agency with special expertise in Joshua Tree resources and management. Charpied App. 5-6.[3]

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[3] In December 1996, NPS for purely political reasons reversed its position on the dump, but did *not* withdraw its comments

(Continued on following page)

Despite NPS' dire warnings, BLM issued a Final Environmental Impact Statement ("FEIS") in January 1997, and thereafter approved the project. On December 22, 1999, respondents Donna Charpied, Laurence Charpied, Desert Protection Society, and Center for Community Action and Environmental Justice (collectively "Conservation Groups") filed the present lawsuit seeking to enjoin the construction of the landfill.

In a lengthy and well-reasoned opinion (Pet. App. B), the United States District Court for the Central District of California, Eastern Division, determined that BLM's approval violated both FLPMA and NEPA. First, it held that BLM had failed to comply with FLPMA's land appraisal requirements because it ignored landfill use in its analysis of the highest and best use of the exchange lands, stating: "BLM's failure to consider an income producing landfill as a potential highest and best use was an abuse of discretion, given that evidence available prior to the undertaking of the appraisal indicated that *the selected lands were expected to be used for landfill purposes.*" Pet. App. 119, emphasis added. The district court also held that BLM's approval violated NEPA because its EIS defined the purpose and need of the project too narrowly and thereby eliminated alternatives to the dump that should have been considered Pet. App.

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regarding the devastating and irreversible impacts of the project on Joshua Tree resources. Pet App. 34

132-135. Based on its determination that BLM's alternatives analysis was deficient, the court stated that remand was important to provide BLM an opportunity to "consider . . . reasonable alternatives to the proposed land exchange and land interest grants which are more environmentally benign and will effectuate the primary purpose and need of generating long-term landfill capacity for Southern California." Pet. App. 135. The final serious flaw described by the district court was that BLM did not take a hard look in its EIS at the eutrophication impacts of the dump, including both "atmospheric nitrate deposition" and "large-scale addition of nutrients . . . to the desert ecosystems." Pet. App. 122-125.

The Ninth Circuit Court of Appeals upheld the district court's opinion on all three of these grounds. First, the Court ruled that BLM's appraisal of the public lands Kaiser sought to acquire inadequately assessed its highest and best use. Pet App. 15-20. Following requirements set forth in applicable statutes, regulations, and the Uniform Appraisal Standards for Federal Land Acquisitions, the Court defined a proper appraisal as one that fairly analyzes the "'highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future.'" Pet. App. 15-16 (*quoting* The Appraisal Institute, *Uniform Appraisal Standards for Federal Land Acquisitions* (2000) 34). The Court also relied on *Desert Citizen Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000), a case in which – just as here – BLM ignored the obvious

"highest and best use" of the land in question and assigned to it instead a falsely deflated value. Pet. App. 16-17. In the present case, the drafters of the Yerke Appraisal were aware of the landfill project, yet explicitly declined to take "'into consideration any aspect of the proposed landfill project.'" Pet. App. 18. Based on the presence of other landfill projects in the area, the Court found that "the highest and best use analysis should have taken the reasonably probable use of public lands for a landfill into consideration." Pet. App. 20.

The Ninth Circuit also affirmed the District Court's holding that the purpose and need statement in the EIS was improper because the majority of the purposes and needs corresponded to Kaiser's goals rather than the goals of BLM. Pet. App. 27-28. As the Ninth Circuit stated, meeting long-term landfill needs is a valid public purpose, but long-term income sources for Kaiser and its fee successors, finding a viable use for mine byproducts located on private land holdings, and long-term development plans for Kaiser's town site are all *private* objectives. *Id.* In arriving at this conclusion, the Court relied in part on the Department of the Interior's NEPA handbook, which *explicitly excludes* consideration of such interests in all statements of purpose and need: (1) "the purpose and need statement for an externally generated action must describe the BLM purpose and need, *not an applicant's or external proponent's purpose and need. . . .*" (emphasis in the original) and (2) "[t]he applicant's purpose and need may provide useful

background information, but this description must not be confused with the BLM purpose and need for the action. . . . It is the BLM purpose and need for action that will dictate the range of alternatives. . . ." Pet. App. 26-27, *quoting* the Department of Interior's NEPA Handbook.

The Ninth Circuit further held that the agency's statement of purpose and need improperly constrained the agency's analysis of project alternatives:

> BLM proposed several alternatives that would have been responsive to the need to meet long-term landfill demand, . . . [but] did not consider these options in any detail because each . . . failed to meet the narrowly drawn project objectives, which required that Kaiser's private needs be met.

Pet. App. 28. Thus, by adopting an excessively narrow purpose and need statement, BLM cut off a searching analysis of alternatives and foreordained approval of the exchange and construction of the dump on Kaiser's chosen site. Pet. App. 28-29. As the Ninth Circuit's opinion accurately points out, all of the so-called alternatives addressed in the EIS "would result in landfill development of some sort and would require some portion of the land exchange to occur." Pet. App. 28. BLM excluded all real alternatives to the project, including all offsite alternatives, based on Kaiser's desire to locate the dump on its old mine site, reap long-term income from use of the site, and acquire rights to and use of the nearby town site. *Id.* Accordingly, the Court concluded that BLM's exclusive

reliance on Kaiser's economic objectives, instead of the needs of BLM and of the public, violated NEPA. *Id.*

In addition to Conservation Groups and others who submitted comments, NPS in its capacity as cooperating agency repeatedly called for an analysis of alternatives that were not adjacent to Joshua Tree:

> . . . the NPS requests the [FEIS] include a detailed comparison of competing regional projects and their relative long-term impacts. . . . [¶] *Only with such a comparison and analysis can the impacts of siting the proposed landfill adjacent to a National Park and a designated wilderness area be fully evaluated* . . . [¶] All reasonable alternative landfill sites must be evaluated as options to the proposed project, even if [BLM does] not feel [it] has jurisdiction to approve other proposed landfill sites in the Southern California region.

Charpied App. 6-8, emphasis added. Accordingly, BLM's failure to consider a reasonable range of alternatives is a profound omission in the EIS that precluded informed public participation and agency decisionmaking. Pet. App. 29. The Ninth Circuit accordingly ruled that BLM must rectify this omission on remand. *Id.*

Finally, the Ninth Circuit found that the EIS contained "no specific discussion of eutrophication," and that the scattered and imprecise treatment that does exist in the EIS did not constitute a hard look at the issue. Pet. App. 31-32. Contrary to the ill-informed

and self-serving claims of *amicus* LA Sanitation that eutrophication is "an invented concept," eutrophication is a complex scientific process that can cause extensive damage to natural resources in areas surrounded by proposed dumps. As explained by NPS' experts in its formal comment letter:

> [E]utrophication is a form of human input of energy and nutrients that has potential for affecting the long-term ecosystem function of Joshua Tree National Park. It would be irresponsible to ignore these long-term and subtle threats in the face of a clear legal mandate to consider future public enjoyment and the need to preserve resources unimpaired for future generations.

Charpied App. 24.

NPS further describes the many different sources of nutrients that would result from the daily importation of 20,000 tons of trash into the desert, and explained that "[i]n the desert where resources are scarce, even small amounts of nutrients are highly attractive to animals and alter wildlife behavior." Charpied App. 19. Specifically, NPS identified many contributors to eutrophication including working landfill areas open to small animals, wind-blown trash, train tracks and roads as sources of dead animals for scavengers, storage and work areas where trash is dumped for spread and compact operations, and various human activities associated with working at and supporting the workers of the landfill. Charpied App. 18-20. Further, as noted by the Ninth Circuit, the

Interior Board of Land Appeals ("IBLA") similarly recognized the significance of the eutrophication issue in its review of BLM's decision. Pet. App. 32, fn. 13.

The Ninth Circuit adopted NPS' expert definition of eutrophication, describing it as the "introduction of nutrients into the desert environment," and held that the EIS in the present case "contains no specific discussion of eutrophication." Pet. App. 31. Based on this determination, the Ninth Circuit held that BLM's "discussion of eutrophication is neither full nor fair." Pet App 32 Rather than "flyspecking," the Ninth Circuit's opinion properly addresses significant inadequacies in the form and content of the EIS – inadequacies that were *specifically identified by NPS*, the cooperating agency with special expertise on the effects of eutrophication on desert ecosystems. Charpied App. 18-20, 24. The Court consequently held that the EIS failed to foster "'informed decision-making and informed public participation.'" *Id.*, *quoting State of California v. Block*, 690 F.2d 753, 761 (1982). The Court concluded that BLM's *post-hoc* "attempt to cobble together a 'hard look' from various other analyses" cannot "serve as a 'reasonably thorough' discussion of the eutrophication issue" and remanded to BLM for further analysis. Pet. App. 32.

ARGUMENT

Kaiser's petition presents to this Court a single, narrow question: whether the Ninth Circuit erred in

deciding to remand a land exchange undertaken by BLM to correct errors in its prior decision. Kaiser explicitly does *not* ask this Court to review the Ninth Circuit's uncontroversial declarations of FLPMA and NEPA jurisprudence (Petition for a Writ of Certiorari ("Pet.") i), namely: (1) that an agency's decision to undertake a land exchange under FLPMA must be supported by a valid, accurate appraisal that takes into account the federal exchange lands' highest and best use (Pet. App. 15-20), (2) that an agency may not define the purpose of a project so narrowly as to unduly limit consideration of all viable alternatives in its NEPA analysis (Pet. App. 23-29), and (3) that NEPA review of a project's impacts must contain a complete and accessible analysis of the significant impacts posed by the project (Pet. App. 31-33). Kaiser also does *not* dispute that BLM failed to adhere to these fundamental FLPMA and NEPA requirements when it approved the land exchange at issue here. Pet. 18.

Instead, Kaiser takes a different track. It argues that the Ninth Circuit was *required* to (1) deem harmless all of the errors in BLM's decisionmaking process and (2) determine *sua sponte* that further agency review of the project consistent with the Court's ruling would not – *could not under any circumstances* – alter BLM's previous decision to approve the land exchange. *Id.* Kaiser's petition is thus nothing more than a bald-faced request for a free pass, which would allow it to construct the proposed Eagle Mountain Landfill *despite* the significant FLPMA and NEPA violations identified by the Ninth Circuit. *Id.* This

request is based on a misapplication of the "harmless error" doctrine and is supported by *nothing more than Kaiser's own speculation* that BLM's future review of the project in light of a legally adequate appraisal and environmental analysis will turn out in its favor. *Id.* Kaiser's novel harmless error theory, if adopted by this Court, would create a new era of environmental litigation in which *even significant agency failings* could be disregarded based solely on a particular court's subjective determination that proceedings on remand would probably not impact the agency's final decision. Such a result would put judges in the seats of agency decisionmakers and emasculate enforcement actions under the nation's most venerable environmental statutes. Because judicial remand to fix significant errors in prior agency decisionmaking is not only appropriate but required by law, Kaiser's petition should be rejected.

In short, the Ninth Circuit's remand of BLM's approval conforms to required procedures and does not conflict with any decision of any other court, including this Court. Conservation Groups do not generally contest the validity of the holdings in the cases cited by Kaiser. Remand is not only in line with these cases, it is required by the statutory provisions upon which those Courts and the Ninth Circuit here based their decisions.

Furthermore, as discussed directly below, though Kaiser had ample opportunity, it nevertheless *failed to raise its harmless error arguments below* and should therefore be barred from raising them here.

I. Kaiser Failed to Raise Its Harmless Error Argument in the Ninth Circuit; Therefore This Court Should Not Grant Kaiser's Petition for a Writ of Certiorari

This Court routinely declines to hear issues that the lower courts did not have the opportunity to decide. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) ("We ordinarily 'do not decide in the first instance issues not decided below,'" *quoting National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470 (1999)). Kaiser had ample opportunity to raise the question of whether the errors identified by the District Court and Ninth Circuit were harmless – including, *e.g.*, in its petition for rehearing *en banc* before the Ninth Circuit – but chose *not* to do so. Charpied App. 25-26. This Court has held that issues which "were neither raised in nor passed upon by the Court of Appeals" will not normally be reviewed by the Supreme Court. *Glover v. United States*, 531 U.S. 198, 205 (2001); *see also, Youakim v. Miller*, 425 U.S. 231 (1976). Because Kaiser failed to provide the Ninth Circuit with an opportunity to address its harmless error theory, its petition should be denied as a matter of course.

II. The Cases Cited by Kaiser All Stand for the Unremarkable and Irrelevant Proposition That Courts Need Not Remand Decisions with Harmless Errors to Agencies for Purposeless Fixes

Conservation Groups agree that minor defects in agency decisionmaking do not always need to be remanded to the agency for further consideration. This is not a remarkable claim, nor are the following cases remarkable for upholding agency decisionmaking in the face of *de minimis* inconsistencies and harmless errors. Here, to the contrary, the Ninth Circuit identified significant statutory violations that directly impacted BLM's substantive decisions. The following harmless error cases cited by Kaiser are therefore inapplicable.

First, in *National Labor Relations Board v. Wyman-Gordon Company*, 394 U.S. 759 (1969), this Court held that the National Labor Relations Board ("NLRB") issued an "unquestionably valid" order and that the respondent was obliged to comply with that order. *Id.* at 766 This Court determined, however, that the Board's citation to a previous NLRB decision as authority for its order was not the correct source of the Board's authority. *Id.* This Court held that remand to fix the citation – when the Board clearly had the authority to issue the order in the first place – "would be an idle and useless formality." *Id.* at 766, fn. 6. This Court concluded: "[t]here is *not the slightest uncertainty* as to the outcome" of such a "meaningless" remand and, therefore, this Court refused to

remand the case to the Board citing the harmless error doctrine. *Id.*, emphasis added.

Similarly, petitioner's reliance on *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) ("*Home Builders*") is also misplaced because the challenged language in that case was a "stray statement, which could have had *no effect* on the underlying agency action being challenged." *Id.* at 659, emphasis added. In *Home Builders*, EPA had published a statement in the Federal Register claiming that consultation under the Endangered Species Act had been completed, while simultaneously taking a position that consultation was not required by the statute. The distinction between voluntary consultation and required consultation "was simply not germane to the final agency transfer decision." *Id.* The *Home Builders* Court thus echoed *Wyman* in stating that an error that did not impact the original administrative proceeding should not be remanded for meaningless re-processing and re-approval. *Id.* at 660.[3]

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[3] The other cases cited by Kaiser reiterate the same established principle. *Mass Trs. of E. Gas & Fuel Assocs v United States*, 377 U.S. 235, 248 (1964) (errors below did not have any bearing on "the procedure used or the substance of the decision reached"), *U.S. Telecom Ass'n v FCC*, 400 F.3d 29, 41-42 (D.C. Cir. 2005) (appropriately equivalent procedures utilized, making remand meaningless); *Sierra Club v Slater*, 120 F.3d 623, 637 (6th Cir. 1997) (lack of notice in administrative proceedings cured where the relevant parties received constructive notice and there was "no credible reason why [such] omission . . . would affect the public's review of the proposal, or in any way change

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Kaiser's citation to various NEPA cases adds nothing new to this well-established harmless error rule. In *Nevada v. Department of Energy*, 457 F.3d 78 (D.C. Cir. 2006), for example, the Department of Energy (DOE) omitted a one-sentence preferred alternative designation, which it later rectified by publishing the designation in the Federal Register with ample time for public comment. *Id.* at 444. The Court held that "NEPA's goal of ensuring that relevant information is available to those participating in agency decision-making was not frustrated by the absence of [the preferred alternative designation]." *Id.* at 444.[4] The other NEPA cases Kaiser cites similarly repeat the uncontested but irrelevant harmless error rule.[5]

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the comments made by them"); *Fisher v. Bowen*, 869 F.2d 1055, 1057 (7th Cir. 1989) (minor vulnerabilities in the opinion of an administrative law judge did not require remand).

[4] Furthermore, the *Nevada* Court implied that the alleged absence of the designation was likely not a NEPA violation because DOE had in fact identified a preferred alternative; plaintiffs there simply wanted more specificity regarding that preferred alternative. *Id.* at 443-444.

[5] *Illinois Commerce Commission v. Interstate Commerce Commission*, 848 F.2d 1246, 1257 (D.C. Cir. 1988) (Remand "was not necessary to guarantee that the Commission will consider environmental concerns" prior to proceeding with the project because the agency was required to conduct further environmental analyses before any substantive action affecting the environment could proceed); *Friends of the River v. Federal Energy Regulatory Commission*, 720 F.2d 93, 106 (D.C. Cir. 1983) (Analysis missing in the EIS was performed by the agency prior to the conclusion of the decisionmaking process; therefore remand would serve only a "punitive" purpose, not the informational

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Further there is no Circuit split on this issue (Pet. 25) because the Ninth Circuit routinely applies the harmless error rule in parallel contexts. For instance, in *Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.*, 42 F.3d 517 (9th Cir. 1994), the Ninth Circuit held that an agency's failure to accurately disclose a toll road's impact in an EIS was harmless error because it did not adversely impact NEPA's informational purposes. Similarly, in *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764 and 769 (9th Cir. 1986), the Court held that the agency's notice did not comply with FLPMA procedures, but the error was harmless because the purpose of the notice was accomplished and the public had ample opportunity to comment. In *Del Norte County v. U.S.*, 732 F.2d 1462, 1466-1467 (9th Cir. 1984), the Court determined that the integrity of the agency's decisionmaking process and the public's ability to comment on the project had not been compromised by the agency's failure to publish its notice in the Federal Register at the precise time prescribed by NEPA. And finally, in *Riverbend*

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goal of NEPA); *Save Our Heritage, Inc. v. Federal Aviation Administration*, 269 F.3d 49, 61-62 (1st Cir. 2001) ("Remanding for a differently named assessment, where the project's negative consequences have already been analyzed and found to be absent and the findings have been disclosed to interested parties, is a waste of time"); *Glisson v. United States Forest Service*, 138 F.3d 1181, 1183 (7th Cir. 1998) (Remand for minor revision to findings would be futile); *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1129 (8th Cir. 1999) (failure of agency to analyze alternatives that are not "viable" is harmless error)

Farms, Inc. v. Madigan, 958 F 2d 1479, 1488 (9th Cir 1992), the Ninth Circuit held that "[t]he Secretary's failure to comply with the specific dictates of the APA's notice and comment requirements is harmless." These cases demonstrate that no Circuit split exists. Far from ignoring the harmless error rule, the Ninth Circuit has embraced it and incorporated it into its jurisprudence along with her sister Circuits.

III. The Violations of FLPMA and NEPA Identified by the Ninth Circuit Are Not Harmless Errors and Therefore Remand Is Required

The APA requires courts to "compel agency action unlawfully withheld or unreasonably delayed" and to "hold unlawful and set aside agency action, findings, and conclusions found to be [ ] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(1)-(2)(A). In accordance with this command, courts have consistently remanded cases to agency decisionmakers for errors that rise above the harmless error standard. *See, e.g., Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972); *Citizens Committee for Hudson Valley v. Volpe*, 425 F.2d 97, 102 (2d Cir 1970); *Silverton Snowmobile Club v. U.S. Forest Service*, 433 F.3d 772, 779-80 (10th Cir. 2006).

FLPMA governs public land management under Congress' mandate that federal agencies pursue their management responsibilities "in a manner that will protect the quality of scientific, scenic,

historical, ecological, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. § 1701(a)(8). Under the APA, agency actions which violate FLPMA must be vacated and remanded where they rise above the harmless error standard. *Center for Biological Diversity v. U.S. Dept. of Interior*, 623 F.3d 633, 647 (9th Cir. 2010) (remanding BLM's designation of a proposed land exchange because its public interest determination under FLPMA was arbitrary and capricious).

NEPA is a public information statute. The purposes of NEPA's environmental review requirements are "to ensure both that an agency has information to make its decision and that the public receives information so it might also play a role in the decisionmaking process." *Department of Transportation v. Public Citizen*, 541 U.S. 752, 754 (2004). As with violations of FLPMA, agency actions which violate the procedural guarantees of NEPA and rise above the threshold of harmless error must be vacated and remanded by reviewing courts. *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971).

Each NEPA and FLPMA violation identified by the Ninth Circuit in the present case constitutes a significant error the reconsideration of which will affect BLM's decisionmaking on remand. Therefore, the Ninth Circuit's remand of the decision to the agency was not only proper, but was indeed required.

A. Remand Is Required to Remedy BLM's Faulty Appraisal

Just as in any real estate transaction, an accurate appraisal is a foundational prerequisite to finalizing an exchange of federal land under FLPMA because it greatly affects bottom-line decisionmaking by federal agencies. Consequently, an agency's reliance on a legally deficient appraisal is a significant error requiring remand for correction.

For example, in *Desert Citizens*, 231 F.3d at 1187, a landfill appraisal case with many parallels to this proceeding, the Ninth Court held that "[t]he action of the BLM was arbitrary and capricious in not, at the very least, considering landfill use as the highest and best use of the [proposed exchange lands]." *Id.* It therefore remanded the case for reconsideration in light of an accurate appraisal. *Id.* Likewise, in the present case, the Ninth Circuit found that "the highest and best use analysis should have taken the reasonably probable use of public lands for a landfill into consideration," and on that basis invalidated and remanded BLM's inaccurate appraisal for correction. Pet. App. 20.

In an incomplete attempt to remedy the faults in its original appraisal (the Yerke appraisal), BLM commissioned a second appraisal, entitled the Herzog report, during the course of the present litigation. Pet. App. 19, fn. 5. Kaiser relies heavily on the Herzog report in claiming that remand for preparation of a full and accurate appraisal is not required. Pet.

25-26. The Herzog report, however, does not fix the problems with the Yerke appraisal for two reasons.

First, as explained by the Ninth Circuit, the Herzog report was never considered by BLM in relation to the decision to approve or disapprove the dump: "[t]here is nothing in the record to indicate that the BLM has rendered a final, appealable decision on an appraisal that properly considers landfill use as a highest and best use." Pet. App. 19-20, fn. 5. Thus, the information in the Herzog report consists of nothing more than post-decisional rationalizations, the use of which has been soundly rejected by this Court.[6]

As pointed out by the Ninth Circuit here, the present situation differs markedly from cases where an agency conducts the required research and analysis and then *reconsiders* the project based thereon. For example in *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000), the agency (1) "prepared an additional [supplemental information report]

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[6] *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (when reviewing an agency decision, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"); *see also Center for Biological Diversity v. U.S. Fish & Wildlife Service*, 450 F.3d 930, 943 (9th Cir. 2006) ("Parties may not use 'post-decision information as a new rationalization either for sustaining or attacking the Agency's decision,'" *citing Association of Pac. Fisheries v. EPA*, 615 F.2d 794, 811-12 (9th Cir. 1980); *Southwest Center for Biological Diversity v. United States Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996)

and several other analyses that specifically addressed the deficiencies" identified by the Court and (2) completed all of the statutorily required decisionmaking processes applicable in that case during the course of the litigation. Pet. App. 19, fn. 5. The Court held that any remand under those circumstances "is unwarranted and serves no legitimate purpose." *Friends of the Clearwater*, 222 F.3d at 559. Thus, under *Friends of the Clearwater*, if BLM had *re*-approved the land exchange in reliance on the Herzog report and followed the required FLPMA processes in doing so, then it would be able to claim that remand would be futile. *Id.* However, BLM's attempt to inject a newly prepared, *internal* report into pending court proceedings, without conducting a formal reconsideration subject to public review and comment as required by BLM's own regulations,[3] does not remedy the problems with the first appraisal identified by the Court. BLM's failure to consider the new appraisal *in a decisionmaking process* that meets FLPMA standards precludes a judicial determination that the agency has already done the requisite work that a remand would require. Pet. App. 19, fn. 5, *citing Center for Biological Diversity*, 450 F.3d at 943. Thus, remand here is both warranted and will serve a very "legitimate purpose" by providing BLM decisionmakers with an accurate estimate of the exchange properties'

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[3] 43 C.F.R. §§ 2201.2, 2201.7-1; *see also* 2201.3-4 (describing appraisal review processes that BLM also failed to follow for the Herzog report).

values prior to making a decision on the merits of the exchange.

Second, the Herzog report again *failed to consider landfill use as the highest and best use for the federal exchange lands*. Rather than conduct this omitted analysis, it impermissibly attempts to excuse the Yerke appraisal's failure to do so. Pet. 11-12. Because the Herzog report ignores the Ninth Circuit's ruling, it fails to remedy deficiencies in the Yerke appraisal. Pet. App 8, fn. 1. As a result, Kaiser's argument that remand of this issue would be futile because the Herzog report answers the questions posed by the Ninth Circuit on remand is dead wrong. Pet. 25, citing Pet. App. I, J. The Ninth Circuit remanded the case to BLM for preparation of an accurate appraisal that meets FLPMA's requirements – an action that BLM has failed to undertake in *either* the Yerke appraisal *or* the Herzog report.

B. Remand Is Required to Remedy BLM's Unreasonably Narrow Statement of Purpose and Need and Its Resulting Inadequate Analysis of Alternatives

1. The Harmless Error Rule Does Not Apply to an Agency's Failure to Consider an Adequate Range of Alternatives

NEPA requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves

unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(C)(iii) and (2)(E). The first step in the analysis of alternatives is the definition of the purpose and need of the project. *Highway J Citizens Group v. Mineta*, 349 F.3d 938, 960-961 (7th Cir 2003) In *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 667 (7th Cir. 1997), the Seventh Circuit emphasized the critical nature of this process:

> When a federal agency prepares an [EIS], it must consider "all reasonable alternatives" in depth. 40 C.F.R. § 1502.14. No decision is more important than delimiting what these "reasonable alternatives" are. That choice, and the ensuing analysis, forms "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. To make that decision, the first thing an agency must define is the project's purpose. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195-96 (D.C. Cir. 1991). The broader the purpose, the wider the range of alternatives; and *vice versa*. The "purpose" of a project is a slippery concept, susceptible of no hard-and-fast definition. One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). *The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role.*

> *Nor can the agency satisfy the Act.* 42 U.S.C. § 4332(2)(E).

Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664, 666 (7th Cir. 1997), emphasis added.

As discussed above, Kaiser does not directly challenge the Ninth Circuit's substantive ruling; it challenges only the Court's decision to remand. Pet. i, 18. Accordingly, Kaiser's main contention is that BLM's refusal to consider any off-site alternatives is harmless error and thus remand would be inappropriate. *Id.* In so arguing, Kaiser ignores *every* case in which a reviewing court determined that if an agency's statement of purpose and need were excessively narrow and consequently its analysis of alternatives was improperly constrained, remand is required.[4]

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[4] *See, e.g., Simmons*, 120 F.3d at 667 (an agency cannot define its objectives in unreasonably narrow terms and remand is required when it thereby circumvents consideration of reasonable alternatives); *Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346, 349-350 (8th Cir. 1972) (same), *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1067 (9th Cir. 1998) (same); *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1098, fn. 5 (9th Cir. 2006) (same); *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) (same); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972) (same); *Citizens' Committee to Save Our Canyons v. U.S. Forest Service*, 297 F.3d 1012, 1030 (10th Cir. 2002) (same); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) (same); *City of New York v. U.S. Dep't of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983) (same); *Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Authority*, 576 F.2d 573, 575-576 (5th Cir. 1978) (same); *Com. of Ky. ex rel*

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Kaiser *fails to cite a single case* in which a court held that an agency failed to consider an adequate range of alternatives, but forewent remand based on its own independent determination that the faulty analysis constituted harmless error. Pet. 26-31.

Thus, based on the Ninth Circuit's holding that BLM's statement of purpose and need and alternatives analysis violated NEPA and on Kaiser's failure to challenge that substantive ruling here, remand is required BLM must analyze an adequate range of alternatives – as such analysis is "the heart of the environmental impact statement" – and reconsider its options prior to any potential re-approval of the project. 40 C.F.R. § 1502.14.

2. The Ninth Circuit Correctly Determined that BLM's Statement of Purpose and Need and Alternatives Analysis Were Improperly Limited

To the extent that Kaiser's petition raises a substantive challenge to the Ninth Circuit's ruling on purpose and need and alternatives (Pet. 26-31), Conservation Groups address those arguments here. Kaiser's collateral and confusing attack on the merits of the Ninth Circuit's ruling, however, fails to adhere to Court Rule 14, which directs: "Only the questions

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Beshear v Alexander, 655 F.2d 714, 718-719 (6th Cir. 1981) (same).

set out in the petition, or fairly included therein, will be considered by the Court."[9]

The Ninth Circuit concluded that BLM crafted "a purpose and need statement so narrowly drawn as to foreordain approval of the land exchange. As a result of this unreasonably narrow purpose and need statement, the BLM necessarily considered an unreasonably narrow range of alternatives." Pet. App. 29. Kaiser argues that BLM's statement of purpose and need correctly included Kaiser's goals in developing the dump at the Eagle Mountain site and therefore properly limited *BLM's* consideration of alternatives to proposals that would fulfill *Kaiser's* private goals. Pet. 26-31. Kaiser's contention is contrary to controlling case law.

The Ninth Circuit's opinion correctly states the standard for determining the adequacy of an agency's statement of purpose and need:

> Our task is to determine whether the BLM's purpose and need statement properly states the BLM's purpose and need, against the background of a private need, in a manner broad enough to allow consideration of a reasonable range of alternatives.

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[9] Pacific Legal Foundation's ("PLF's") *amicus curiae* brief also violates this Court's rules by challenging the merits of the Ninth Circuit's ruling instead of addressing the narrow procedural questions presented by Kaiser. Rule 37 (briefs of *amici curiae* must contain "relevant matter").

Pet. App. 28. This statement is based on the well-established principle that "an agency will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered." *City of New York*, 715 F.2d at 743.[10] Further, as here, "[w]hen the proposed action . . . is an integral part of a coordinated plan to deal with a broad problem, [disposal of Southern California trash,] the range of alternatives that must be evaluated is broadened." *'Ilio'ulaokalani*, 464 F.3d at 1098, *quoting City of Alexandria v. Slater*, 198 F.3d 862, 868 (D.C. Cir. 1999); *NRDC*, 458 F.2d 827, 835. While agencies enjoy deference in defining their objectives and alternatives, "[d]eference . . . does not mean dormancy, and the rule of reason does not give agencies license to fulfill their own prophecies." *Burlington*, 938 F.2d at 196.

The Department of Interior's NEPA Handbook, on which the Ninth Circuit properly relied, instructs that "the purpose and need statement for an externally

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[10] *See also, Simmons*, 120 F.3d at 666, *Friends of Southeast's Future*, 153 F.3d at 1067; *'Ilio'ulaokalani*, 464 F.3d at 1098, fn. 5; *City of Carmel-By-The-Sea*, 123 F.3d at 1155; *Sylvester v. United States Army Corps of Eng'rs*, 882 F.2d 407, 409 (9th Cir. 1989); *Citizens Against Burlington, Inc. v Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991), *City of New York*, 715 F.2d at 743, *Highway J Citizens*, 349 F.3d at 960-961; *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002); *EDF*, 473 F.2d at 349-350; *NRDC*, 458 F.2d at 834; *Citizens' Committee to Save Our Canyons*, 297 F.3d at 1030, *Grazing Fields Farm*, 626 F.2d at 1072; *Save Our Sycamore*, 576 F.2d at 575-576; *Com. of Ky ex rel. Beshear*, 655 F.2d at 718-719

generated action must describe the BLM purpose and need, *not an applicant's or external proponent's purpose and need.*" Pet. App. 26-27, emphasis in the original. The Handbook further clarifies: "The applicant's purpose and need may provide useful background information, but this description must not be confused with the BLM purpose and need for the action. . . . It is the BLM purpose and need for action that will dictate the range of alternatives. . . ." *Id.* BLM ignored these instructions and instead adopted Kaiser's private goals as its own and thereby eliminated consideration of any offsite alternatives. Pet. App. 27-29.

In arguing that the Ninth Circuit's holding was incorrect, Kaiser obfuscates the pivotal distinction between *acknowledging* private purposes and being *constrained* by them. Pet. 26-31. Yet all Circuit Courts agree that the government must consider the private interests driving the project proposed, but *not eliminate viable alternatives to the project that would better serve the public's interests.*[11] For example, in *Roosevelt Campobello International Park v. EPA*, 684 F.2d 1041, 1044 (1st Cir. 1982), the Environmental Protection Agency ("EPA") considered a specific development proposal from a private party for an oil refinery and deep water terminal in Eastport, Maine. *Id.* In accordance with NEPA, EPA considered a wide range of alternatives, including three alternative

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[11] *See, e.g.*, cases cited in footnote 10.

sites, Portland, Machias, and Penobscot/Blue Hill, with the specific goal of comparing the environmental impacts of development in the proposed location versus the impacts in the three other locations. *Id.* The Court upheld EPA's analysis as presenting an adequate range of alternatives. *Id.* Accordingly, the Ninth Circuit's reiteration of the standard rule was not in error: "[r]equiring agencies to consider private objectives . . . is a far cry from mandating that those private interests define the scope of the proposed project." Pet. App. 24-25.

The cases cited by Kaiser do not present a different rule or create a conflict among the Circuits. In fact, the cases are striking in their uniformity on this issue. For example, in *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1174-1175 (10th Cir. 1999), the Tenth Circuit held that agencies "are precluded from completely ignoring a private applicant's objectives," but they cannot define the objectives of their actions in unreasonably narrow terms. *Id.* The Court specifically relied on the Seventh Circuit's holding in *Simmons*, *supra*, forbidding unreasonably narrow statements of purpose and need to assure consideration of a reasonable range of alternatives:

> As noted, [NEPA] and Center for Environmental Quality regulations require the Forest Service to study in detail all "reasonable" alternatives. The Seventh Circuit, and other courts, have interpreted this requirement to preclude agencies from defining the objectives of their actions in terms so unreasonably narrow they can be accomplished by only

> one alternative (i.e., the applicant's proposed project). *See, e.g., Simmons*, 120 F.3d at 669, *Burlington*, 938 F.2d at 195-96, *cert. denied*, 502 U.S. 994 (1991). Agencies also are precluded from completely ignoring a private applicant's objectives. We do not perceive these authorities as mutually exclusive or conflicting. They simply instruct agencies to take responsibility for defining the objectives of an action and then provide legitimate consideration to alternatives that fall between the obvious extremes.

Colorado Environmental Coalition, 185 F.3d at 1174-1175 (some citations omitted or modified, emphasis added). Kaiser and *amicus curiae* PLF, which relies extensively on *Colorado Environmental Coalition*, ignore the actual language of the cases they cite to their detriment. Pet. 3, 16-17; PLF *Amicus* Br. 4, 6, 11-13, and 17.[13]

Even Kaiser's formulation of the rule implicitly concedes the standard used by all Circuits, including the Ninth Circuit. It states, for example, that BLM was required to "*acknowledge* Kaiser's purposes," not

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[13] PLF and Kaiser disagree on the extent of an alleged Circuit split. Kaiser maintains that the Ninth Circuit is alone in its interpretation of the proper formulation of statements of purpose and need, while PLF argues that both the Ninth and Seventh Circuits are out of step with the rest of the nation. Pet. 21, *citing Fisher*, 869 F.2d at 1057, PLF *Amicus* Br. 16. Both are mistaken as the rule is consistently stated throughout *all* Circuits. *See* cases cited in footnote 10.

adopt or otherwise be constrained by them in selecting alternatives Pet. 27, emphasis added. Similarly, Kaiser explains that "when an agency 'is responding' to a private proposal, it is required to *discuss* the private purpose motivating the project." Pet. 3, emphasis added. Exactly right. The Ninth Circuit did not rule that an agency must ignore an applicant's goals; it simply held that BLM's wholesale adoption of Kaiser's goals was inappropriate. Pet. App. 23-29.

Additionally, in an attempt to parallel the flawed logic in the dissent below, Kaiser relies on BLM's determination under FLPMA that the land trade serves the public interest to moot the need for a searching analysis of alternatives under NEPA. Pet. 29. It claims that "it is now decisively settled that . . . there is no prospect that BLM will reverse its determination" to approve the land exchange with Kaiser – *no matter what the alternatives analysis on remand reveals. Id.* Kaiser forgets that this is *public* land and BLM's duty under both FLPMA and NEPA is to assure that the *public's* interests – not just Kaiser's – are best served by the land trade. Some alternatives may benefit the public interest *more* than the proposed project. Such *comparative* analysis is exactly the type of information that NEPA requires agencies to develop prior to approval of a project. Kaiser's conflation of the FLPMA finding of public interest and NEPA's alternatives analysis requirement illogically assumes that only Kaiser's proposed project could ever serve the public interest and thereby seeks to eliminate all other alternatives – including those offsite – before

they are even analyzed. *Id.* A FLPMA finding of public interest, however, does not somehow trump NEPA's required alternatives analysis. Such a rule "would be anathema to NEPA's 'twin aims' of informed agency decisionmaking and public access to information." *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 707 (10th Cir. 2009) (citations omitted)

And finally, Kaiser also seems to argue that all offsite alternatives to the proposed project were infeasible as they were "not 'viable' under the Management Act." Pet. 13, 29-30. This argument is false, was never raised below (Pet. App. 22-29), lacks evidentiary support from the administrative record, and is therefore utterly inappropriate in the present procedural context. As the Ninth Circuit found: "BLM proposed several alternatives . . . to meet long term landfill demand, such as a landfill on other Kaiser property, waste diversion, offsite landfill locations, landfill mining . . . ," but summarily rejected them – *not based on infeasibility* – but "because each of these alternatives failed to met the narrowly drawn project objectives, which required Kaiser's private needs to be met." Pet. App. 28. If Kaiser had wanted to make an infeasibility argument, it should have raised it below, not in the offhand, unsupported manner that it presents in its petition. *Adarand*, 534 U.S. at 109.

Thus, contrary to Kaiser's contentions, the Ninth Circuit's holding on purpose and need and range of alternatives was proper and the case should be remanded to BLM for further consideration.

C. Remand Is Required to Remedy BLM's Inadequate Review of Eutrophication Impacts

In assessing whether an agency acted arbitrarily in its environmental review process under NEPA, the role of the court is to ensure that the agency has taken a "hard look" at the environmental consequences of its actions. If the agency has not done so, the proper remedy is remand to the agency for further proceedings.[13] Thus, in the present case, the Ninth Circuit acted in accordance with settled case law when it remanded the landfill decision as a result of its finding that BLM had not taken a hard look at eutrophication impacts. Pet. App. 32.

Kaiser asserts that BLM adequately discussed eutrophication, and that any faults in its analysis constitute mere harmless error. Pet. 31-32. It claims that the Ninth Circuit's ruling was limited only to a determination that the "form" of the EIS was improper. *Id.* But that is not the case. The Court found that BLM failed to address a wide range of the dump's impacts, stating that "the discussion of

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[13] *See Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996) (the Army Corps of Engineers did not take a hard look at zebra mussel infestation, and was instructed to do so on remand, *citing Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989)); *State of California v. Block*, 690 F.2d at 761; *Maryland-National Capital Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029, 1043 (D.C. Cir. 1973); *Center for Biological Diversity*, 623 F.3d at 642-643; *NRDC*, 458 F.2d at 838.

eutrophication is *neither full nor fair*." Pet. App. 31-32, emphasis added. As noted by the Court, BLM's scant analysis only addresses atmospheric nitrate deposition, a minute fraction of the projected eutrophication impacts the landfill will have on the surrounding desert. *Id.*; Charpied App. 18-20, 24. Furthermore, it is undisputed that BLM only applied its airborne nitrate production analysis to lands within Joshua Tree, neglecting to analyze potential impacts on other surrounding areas. Pet. App. 31. This error alone demonstrates that the EIS failed to take a hard look at eutrophication and that remand for further study is required to fulfill NEPA's call for informed decisionmaking.

Rather than "fly-specking" as Kaiser calls it, the Ninth Circuit's opinion properly requires a reasonable measure of accuracy, clarity, and completeness on the important issue of eutrophication and therefore properly remanded the case for further analysis.

IV. Lengthy Project Approval Processes Are Not Sufficient Legal Reason to Grant Certiorari

Kaiser, the *amici curiae*, and Judge Trott's lengthy dissent all insinuate that the amount of time that has expired since Kaiser's landfill project was first proposed has some bearing on the legality of BLM's analysis of the project under FLPMA and NEPA. *See, e.g.*, Pet. 32-35; PLF *Amicus* Br. 3-4, 19-21; Pet. App. 35-36. But nothing in either statute allows a free pass

once the approval process exceeds a certain time frame – indeed, to imply some sort of implicit time limit would fundamentally alter both statutes in violation of traditional norms of statutory interpretation. Instead, it is imperative that both statutes be strictly enforced. Furthermore, the length of time that the project will function and have a detrimental effect on the environment – *approximately 120 years* – counsels prudence and a full, complete, and legally-sound evaluation of the project prior to approval. Pet. App. 6. Rushing to judgment here as a form of compensation for past delays could condemn one of the nation's most spectacular national parks to 12 decades of degradation and deterioration.

Further, Kaiser, *amicus curiae* LA Sanitation, and Judge Trott's dissent all claim that Kaiser's landfill proposal is a "critical project" that will provide "desperately needed landfill space." Pet. 35; LA Sanitation *Amicus* Brief 9; Pet. App. 46-47. The record demonstrates, however, that this Project does not respond to an imminent landfill crisis. Pet. App. 24, 27, and 45. Most prominently, BLM's Record of Decision ("ROD") itself presents a multitude of available long-term planning solutions. BLM acknowledged that "[p]roposed regional landfills at other locations outside of Riverside County would, if successful, help . . . to address the Southern California region's long-term waste disposal needs. . . ." Pet. App. 231-32. The ROD dismisses these other landfills, however, because "they would not accomplish the reclamation of the Kaiser mine site." *Id.*

Yet BLM's ROD acknowledges that there are other landfill sites in San Bernardino County and the "approved Mesquite Landfill in Imperial County," as well as available landfill capacity outside of California, as other options for long-term disposal – but again dismisses those options because they do not meet *Kaiser's private goals*. *Id.* Furthermore, the ROD dismisses the potential of conservation and landfill mining partially because these alternatives "would not address one of the objectives of the Project, the reclamation of the former Kaiser mine site." Pet. App. 233. Additionally, the EIS acknowledges significant and continuing source reduction as a result of the California Integrated Waste Management Act, including "decreases attributable to increased source reduction, recycling and composting activities, and a prolonged statewide economic recession." Pet. App. 337.

BLM's own analysis thus demonstrates that many options existed at the time of project approval – some of which have been pursued and are now operational, such as the Mesquite Regional Landfill project (LA Sanitation *Amicus* Brief 6) – to address any shortfall in capacity caused by the delays in the present project.

CONCLUSION

The Ninth Circuit's Opinion does not conflict with other Circuit Courts' rulings, is based on well-established and noncontroversial statements of FLPMA and NEPA jurisprudence, and does not identify mere harmless errors. Therefore the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 25, 2011

No. 10-548

IN THE

Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC., AND
MINE RECLAMATION CORPORATION,

Petitioners,

v.

NATIONAL PARKS & CONSERVATION
ASSOCIATION ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF NATIONAL PARKS CONSERVATION ASSOCIATION IN OPPOSITION

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QUESTION PRESENTED

Where a court finds that an agency, in disposing of federal public lands, (1) failed to take the requisite "hard look" mandated by the National Environmental Policy Act and (2) failed to satisfy the "highest and best use" requirements of the Federal Land Policy Management Act, may the court vacate the decision and remand for further consideration consistent with these statutes?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, National Parks Conservation Association states that it is a non-profit organization with no parent corporations.

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STATEMENT OF THE CASE

The petition for certiorari describes the case that Kaiser Eagle Mountain, Inc. and Mine Reclamation Corporation (collectively "Kaiser") would like to present to the Court, not the case that actually exists. This case challenges a decision by the Bureau of Land Management ("BLM") to dispose of federal public lands adjacent to Joshua Tree National Park for private development of what would become the nation's largest solid waste landfill. Based on a lengthy administrative record, the courts below found that BLM violated core substantive and procedural requirements of two different federal statutes, the Federal Land Policy Management Act of 1976 ("Management Act"), 43 U.S.C. §§ 1701-1787, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347, in approving the land transfer. As federal courts across the nation routinely do every day, the Ninth Circuit Court of Appeals vacated the unlawful agency decision and remanded the matter for further consideration in accordance with applicable law. Contrary to Kaiser's suggestion, no court or individual judge ever held that BLM must or necessarily will make the same decision on remand.

1. At issue here are nearly 4,000 acres of federal public land nestled in the foothills of the Eagle Mountains and surrounded on three sides by Joshua Tree National Park. Resp. App. 3. The Park is an International Biosphere Reserve providing important habitat for desert wildlife, spectacular geologic formations, and "outstanding recreational opportunities" for over one million visitors each year. Resp. App. 67-68. Its "[c]lean and unpolluted air affords distant vistas," and the "natural quiet and

clear night skies are essential for the visitor to realize the beauty and tranquility of the park." *Id.* 67.

Pursuant to congressional directive, the National Park Service manages the vast majority of Joshua Tree as wilderness. Resp. App. 65-66. This wilderness provides a rare "opportunity for recreational experiences that are primitive, nonmechanized, and nonmotorized . . . [and] for solitude." *Id.* 69. The public land targeted for landfill development by Kaiser lies a mile from the Park's boundary. The Park Service's sister agency, BLM, manages this targeted land, along with millions of other acres in the Mojave Desert, pursuant to the Management Act.

2. From 1948 until 1983, Kaiser Steel Corporation operated an open-pit iron mine in the vicinity of the proposed landfill on land patented under 19th century mining laws. It also maintained a 461-acre "Townsite" on land conveyed to Kaiser under Private Law 790, subject to a mandatory reverter once mining activities ceased.[1] During its mining operations on these lands, Kaiser created four deep mining pits from which it extracted over 940 million tons of ore and earth, heaping mine tailings into large waste piles and surface impoundments. In total, Kaiser disturbed over 5,500 acres of land (apparently including some federal property) and left

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[1] Enacted in 1952, PL 790 provided that the 461-acre conveyance "shall" revert to the United States once the use of the property for purposes incidental to mining operations ceased for a continuous period of seven years. Resp. App. C. Although Kaiser ceased mining operations more than a quarter century ago, the federal government has inexplicably declined to exercise the public's reverter in the Townsite parcel.

them unremediated when it ceased mining operations. Resp. App. 2, 92; *compare id.* 6, *with* 34.

Soon thereafter, Kaiser filed for bankruptcy, ultimately obtaining approval for a Plan of Reorganization that extinguished the retirement benefit claims of former employees. Brief of *Amicus Curiae* New Kaiser Voluntary Employees' Beneficiary Association ("VEBA Br.") 1-2. In lieu of funding its prior employee commitments, Kaiser formed a new corporate venture (the parent of current Petitioners), in which its retirees hold a ten percent beneficial interest, to create a new revenue stream from development of a landfill project at the former mine site. *Id.* 3; Resp. App. 5 (explaining that one of Kaiser's primary objectives in developing the landfill is to "[p]rovide a long-term income source for a pension plan that supports retirees of the former Kaiser Steel Corporation").

The 4,654-acre landfill project that Kaiser eventually proposed, however, was not limited to – or even centered around – its own mining-damaged patented lands. Instead, Kaiser sought to acquire 3,942 acres of adjacent federal public land, or 85 percent of the total project site, to construct the landfill, including 3,481 acres of BLM-managed land and permanent fee title to the 461-acre Townsite that would otherwise revert to federal ownership. Resp. App. 24-26. In contrast, a project built entirely on Kaiser's patent land would cover a mere 298 acres. *Id.* 29.

The proposed landfill project is not intended primarily to remediate Kaiser's damaged lands. As designed, it will accept 708 billion tons of rail-hauled waste from Los Angeles County and elsewhere over a

period of 117 years, ultimately filling 2,164 acres with trash. Resp. App. 25. Much of this trash footprint currently is rocky hillside habitat and canyon land unaffected by prior human activity. *Id.* 31-32. Three of the four deep mining pits on Kaiser's patented land will never receive waste and, therefore, will not be "reclaimed" by the proposed project. *E.g.*, *id.* 6, 18, 34 (showing targeted federal lands, existing mining pits, and proposed phasing of landfill activities). One pit ultimately will receive waste, but filling will not begin until the seventy-eighth year of operation and will not be completed until the landfill closes four decades later. *Id.* 21-23.

In exchange for 3,942 contiguous acres of federal land bordering Joshua Tree wilderness, Kaiser offered BLM ten smaller, noncontiguous parcels scattered along the unused Eagle Mountain Railroad right-of-way. Resp. App. 7-10. These 2,846 acres of checkerboard land, situated in a remote and inaccessible area of the desert, face no foreseeable threat of development that would adversely affect their existing habitat value for wildlife. Moreover, Kaiser will not convey these lands in full fee title. Instead, it will retain a 200-foot easement across each parcel to accommodate operation and maintenance of the reactivated rail line. *Id.*

In addition, the proposed land exchange requires BLM to grant newly created rights-of-way over many miles of other federal land along the Eagle Mountain Railroad line and Eagle Mountain Road. These permanent rights-of-way will replace the temporary rights-of-way previously granted to Kaiser under a

reversionary interest,[2] allowing widening and extension of the present road and reactivation of the dormant rail line for waste hauling. Resp. App. 10-16.

3. In processing Kaiser's proposed land exchange, BLM had to satisfy substantive and procedural requirements of both the Management Act and NEPA. These statutes serve very different functions and require wholly separate analyses; findings under one statute are distinct from and independent of findings under the other.

a. *Management Act Requirements.* With passage of the Management Act in 1976, Congress dramatically altered national public land management policies. Breaking with historical efforts to divest and develop public property, the law now provides that federal lands should be (1) "retained in Federal ownership, unless as a result of the land use planning procedure provided for in [the] Act, it is determined that disposal of a particular parcel is in the national interest," 43 U.S.C. § 1701(a)(1), and (2) managed "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. § 1701(a)(8).

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[2] PL 790 granted Kaiser a right-of-way along almost 27 miles of the 52-mile Eagle Mountain Railroad line and along the Eagle Mountain Road that runs across BLM lands adjacent to the eastern edge of the Park. Both of these rights-of-way, like the Townsite property, revert by their own terms to the federal government after seven years of non-use for mining-related purposes. Resp. Pet. 11-12; C.

Accordingly, the Management Act imposes stringent minimum requirements on any disposal of public lands. Before it can approve a land exchange, BLM must demonstrate both that (1) the public interest will be well-served by the transfer and (2) the lands to be exchanged are of equal value. 43 U.S.C. § 1716. To comply with the first requirement, BLM must find that (a) the resource values and public objectives served by disposing of the land outweigh those of retaining it and (b) the intended use of the disposed land will not significantly conflict with management objectives on remaining adjacent federal lands. 43 C.F.R. § 2200.0-6(b). To comply with the second requirement, BLM prepares an appraisal evaluating the "highest and best use" of the land to be transferred. *Id.*; 43 C.F.R. § 2201.3-2(a)(1)-(2). The Uniform Appraisal Standards for Federal Land Acquisitions, to which the BLM must adhere, 43 C.F.R. § 2201.3, define "highest and best use" as '[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future." Pet. App. 15-16. If BLM finds that a proposed land exchange satisfies these two criteria, it may approve the transaction, but is under no statutory compulsion to do so.

b. *NEPA Requirements.* NEPA is our basic federal charter for the environment, 40 C.F.R. § 1500.1(a), declaring "a broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-49 (1989). It mandates that an agency "take a 'hard look' at the environmental consequences" of a federal proposal before embarking on any major action. *Balt. Gas & Elec. Co. v. Natural*

Res. Def. Council, Inc., 462 U.S. 87, 97 (1983). As part of this "hard look," the agency must prepare an environmental impact statement ("EIS") disclosing the environmental consequences of the proposal, the unavoidable adverse effects of proceeding with the action, and a reasonable range of comparative alternatives to the project. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.4–1502.14.

The alternatives analysis lies at "the heart of the environmental impact statement." 40 C.F.R. § 1502.14; *see Alaska v. Andrus*, 580 F.2d 465, 474 (D.C. Cir.), *vacated in part as moot sub nom., Western Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978). It plays the role of "sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. §1502.14. Thus, an EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives." *Id.* The alternatives analysis is tied, in turn, to the scope of the stated purpose and need for the EIS: "The stated goal of a project necessarily dictates the range of 'reasonable' alternatives and an agency cannot define its objectives in unreasonably narrow terms" without violating NEPA. *Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997); *see also* 40 C.F.R. § 1502.5. In defining the goals of the project and the purpose and need for the EIS, the agency must "look hard" to congressional intent behind the statute authorizing the proposed federal action – here, the Management Act policy of retaining public land in federal ownership and protecting adjacent public resource values. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (Thomas, J.), *cert. denied*, 502 U.S. 994 (1991).

Although NEPA, unlike the Management Act, is a procedural statute, it serves a vital role in the decisionmaking process: "It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson*, 490 U.S. at 349. These functions are particularly important here, where the proposed land transfer runs counter to BLM's general obligation to retain public property.

4. To comply with the Management Act, BLM commissioned a land appraisal by David Yerke. That appraisal considered the "highest and best use" of the targeted public lands to be "holding for speculative investment and future capital appreciation." Resp. App. 104. It did so with full knowledge that the purpose of the exchange was to develop a landfill. *Id.* 90, 95 (noting that "the opinions of value expressed within this appraisal report do not take into consideration any aspects of the proposed landfill project"). Based on this premise, Yerke valued the 3,481 acres of BLM-managed federal land at $79 per acre and the 461-acre Townsite land at $106 per acre.[3] Pet. App. 7-8. Shortly after approval of the exchange, Kaiser conditionally sold the aggregated

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[3] Notably, the *total* appraised value of the Townsite (461 acres × $106 per acre = $48,866) was less than the $61,482 in *monthly* rental payment Kaiser was then receiving under a lease of the property to the State of California for non-mining purposes. Resp. App. E.

property and permits to Los Angeles County for $41 million, or roughly $8,800 per acre. Pet. App. 8 n.1.

5. To comply with NEPA, BLM and the County of Riverside commissioned a joint Environmental Impact Report/Environmental Impact Statement ("EIR/EIS"). The EIR portion of the document was necessary to satisfy the County's responsibilities under the California Environmental Quality Act in connection with its decision to grant local land use approvals for the private landfill project. The EIS portion of the document, by contrast, was necessary to comply with BLM's NEPA obligations in connection with its very different decision to dispose of public lands under the Management Act.

The joint EIR/EIS listed four narrow objectives as the "purpose" for the environmental review: (1) to meet long-term demand for landfill capacity in Southern California, (2) "to provide a long-term income source" from the development of a landfill, (3) to find an "economically viable" use for Kaiser's mining wastes, and (4) to provide long-term "use and development" for Kaiser's Townsite property. Pet. App. 335. BLM refused to give detailed consideration to any alternative that did not satisfy all of these objectives, which meant that Kaiser's commercial interest in generating additional income from, and finding new economic uses for, its old mining facilities[4] foreclosed consideration of any alternative

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[4] In its petition, Kaiser suggests for the first time that the "long-term income source" discussed in the EIR/EIS refers to income "the government" will use to mitigate project impacts. Cert. Pet. 5. This fanciful statement is belied not only by the record and history of this case – where Kaiser argued vigorously that BLM must give priority to the corporation's private

way to meet perceived landfill capacity needs or better manage resource values on BLM lands. The EIR/EIS concluded, for example, that landfill projects "proposed to be located elsewhere" on BLM's vast Mojave Desert holdings were not "true" or "feasible" alternatives under NEPA, despite potentially satisfying regional demand for landfill capacity, because "they do not meet several basic objectives of the Project and/or are not within the jurisdiction of the County of Riverside" and because "[t]here are no reasonable means by which the Project applicant" can satisfy its private goal of generating revenue from development. Resp. App. 37-39.

6. After BLM approved the land exchange, Respondent National Parks Conservation Association ("NPCA") timely protested the decision to the California State Director, duly appealed his denial to the Interior Board of Land Appeals, and ultimately filed suit in district court. NPCA argued that the exchange decision violated the Management Act because the Yerke appraisal undervalued the transferred lands in light of their anticipated use for a landfill and because BLM's public interest finding

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revenue-generating project objectives – but also by the *amicus* brief of former Kaiser employees, who contend that they are depending on the revenue stream from the landfill to fund the promised retirement benefits that Kaiser shed during the bankruptcy proceedings. VERA Br. 3. The environmental monitoring and mitigation funding to which Kaiser's petition refers is not the core project revenue stream described in the purpose and need statement, but rather, an additional $1 per ton "tipping fee" on waste generators imposed as a condition of project approval by both state and federal agencies to blunt initial opposition by the Park Service and others that the landfill is incompatible with surrounding land uses and resource values. Resp. App. 41-42.

for the exchange was not supported by substantial evidence in the record. NPCA also argued that the "purpose and need" statement and related alternatives analysis in the EIS were inadequate to satisfy the agency's separate and independent obligations under NEPA, especially given BLM's finding that the landfill will have "significant" adverse impacts on the wilderness experience in nearby Joshua Tree National Park.[5]

While the matter was pending in the district court, the Ninth Circuit issued its decision in the factually analogous *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000). Reversing the trial court's denial of a preliminary injunction for a similar land exchange at the Mesquite Regional Landfill project in nearby Imperial County, *Desert Citizens* held that BLM's appraisal erred by failing to value the land's anticipated and probable use as a landfill. *Id.* at 1180-87.

After plaintiffs filed their opening summary judgment briefs explaining that Mr. Yerke's appraisal methodology was virtually identical to the one invalidated in *Desert Citizens*, defendants commissioned a new report by Steven Herzog. The BLM District Manager explained that the purpose of Mr. Herzog's report was "to complete a new and

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[5] Respondents Donna Charpied, et al. filed a parallel suit that included additional legal claims beyond those raised by NPCA. Although the two cases were never formally consolidated, they were briefed simultaneously throughout the proceedings, and the lower courts issued joint decisions. Several of the Charpied plaintiffs' separate claims were unsuccessful. This brief does not address their surviving NEPA claim on eutrophication.

expanded analysis of the highest and best use of the federal lands." Pet. App. 302 The resulting report opined that Kaiser's landfill project was not financially feasible in 1997 because it was not needed in the near future. *Id.* 303.

On January 10, 2003, the District Manager penned an internal memo in which he noted that "Mr. Herzog's report more fully articulates why landfill use was not the highest and best use of the federal lands in 1997" and concluded that he "found nothing which indicates that it is necessary to revise or revisit" the September, 1997 decision. *Id.* Three days later, on January 13, 2003, defendants attached this internal memo as an exhibit to their opposition brief in the district court. On January 31, 2003, they submitted a declaration authenticating the Herzog report and BLM internal memo and seeking to "supplement" the Administrative Record – filed with the court years earlier – for the 1997 decision, purportedly in rebuttal to an expert declaration submitted by the Charpied parties.[6] Pet. App. 299. Neither the Herzog opinion nor the internal BLM review memo was an actual appraisal, an agency decision, or part of any formal or informal agency proceeding; both documents were litigation-driven attempts to bolster the flawed methodology and missing analysis in Mr. Yerke's earlier appraisal. *See, e.g.*, Pet App. 306 (explaining that the Herzog

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[6] Kaiser erroneously states that "[i]n their motion for summary judgment in district court, respondents relied on a new appraiser's declaration." Cert. Pet. 8. As Kaiser is well aware, NPCA did *not* submit expert testimony of any kind and consistently opposed the admission of post-decisional expert appraisal testimony.

report "is not an appraisal" and that "this is a matter in litigation and my review may be used by DOJ in defending the litigation").

For this reason, NPCA took the position, as did BLM,[7] that the Administrative Record was limited to the documents considered by BLM *at the time of the land exchange decision*. Consistent with this basic tenet of administrative law, the district court did not consider Mr. Herzog's opinion – or the post-decisional opinion declaration submitted by the Charpied parties – in its decision.

7. After the district court granted in part and denied in part cross-motions for summary judgment, defendants appealed. The Ninth Court affirmed judgment for plaintiffs on four independent grounds. First, it found that BLM failed to properly assess the value of the transferred land in light of its anticipated use as a landfill, in violation of the Management Act and *Desert Citizens*. Pet. App. 22. As had the district court, the Ninth Circuit declined to consider the 2002 post-decisional opinion of Mr. Herzog to support the 1997 Record of Decision because it was not properly part of the administrative record for the land transfer and was not the subject of any subsequent BLM action or decision process. Pet. App. 19 n.5.

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[7] In its opening brief on appeal, for instance, BLM stated: "Neither the Charpieds' extra-record evidence, nor the Herzog report were part of the administrative record before BLM. And neither was addressed by the district court. . . the government submitted the Herzog report only in response to the Charpied's improper submission." Opening Brief of the Federal Government Appellants 33-34.

Additionally and independent of the Management Act violation, the Ninth Circuit held that the EIS was inadequate under NEPA because it unreasonably limited the purpose and need statement, failed to consider a reasonable range of alternatives to the proposal, and insufficiently addressed the landfill's introduction of nutrients into the desert environment. Pet. App. 22-29, 31-33.

In reversing the district court's conclusion that BLM's "public interest" finding under the Management Act was not supported by the record, the Ninth Circuit concluded only that: "Though we do not necessarily agree with the BLM's public interest determination, the record as a whole establishes that the BLM's interpretation of 'full consideration,' as evidenced by the analyses in the EIS, is permissible under 43 U.S.C. § 1716(a)." Pet. App. 22. Thus, contrary to Kaiser's central premise here, the majority did not hold that the landfill project is necessarily in the public interest or that BLM made an immutable public interest finding that cannot and will not be revisited upon remand, once all impacts, reasonable alternatives, and statutorily prescribed considerations are properly considered.

In his colorful dissent, Judge Trott focused, as does Kaiser here, on the "safety" of the proposed landfill – something never put at issue by this case – and misapprehended the facts in two ways relevant to the current petition. First, the dissenting analysis is premised on the mistaken belief that Mr. Herzog's post-decisional report and BLM's internal review memos "were made part of the administrative record" and constituted a "final, appealable decision." Pet App. 95-96. The conclusion of the majority, and the

lower court before it, was precisely the opposite; they correctly found that these *post hoc* rationalizations were not properly part of the administrative record and, therefore, should not be considered by a reviewing court.

Second, the dissent incorrectly conflated the "public interest" requirement of the Management Act with the separate and independent environmental review and disclosure requirements of NEPA. Judge Trott concluded that BLM's public interest finding negated any concern about the legality of the purpose and need statement or alternatives analysis. Pet. App. 54. Thus, the dissent did not find "harmless error" or error of any kind. Judge Trott simply disagreed with his colleagues that NEPA obligations operate independently of the Management Act. The same flawed thinking undergirds Kaiser's arguments before this Court.

8. Kaiser, but notably not the federal government, petitioned for rehearing and rehearing *en banc*, on the grounds that the majority's "purpose and need" holding conflicts with prior Ninth Circuit precedent, the EIS adequately considered eutrophication impacts, and the Herzog opinion should have been considered dispositive on the question of "highest and best use." Kaiser did *not* argue that the decision conflicts with the law of other circuits or this Court, that the NEPA violations constituted "harmless error," or that remand of the alternatives analysis would be "pointless." After making minor modifications to the original decision, the Ninth Circuit denied the petition, without dissent.

REASONS FOR DENYING THE WRIT

This case does not implicate the "harmless error" standard or create a circuit split of any kind. Like other circuits, the Ninth Circuit refuses to "fly-speck" NEPA documents for minor errors or elevate "form over substance" in reviewing agency decisions. *See, e.g.*, *Churchill County v. Norton*, 276 F.3d 1060, 1081 (9th Cir. 2001) (Paez, J.) (holding that it is "not [the court's] role" to "fly-speck" an EIS), *amended by* 282 F.3d 1055 (9th Cir. 2002); *Swanson v. U.S. Forest Service*, 574 F.3d 723, 746 (9th Cir. 1996) (explaining that courts should not "fly-speck" an EIS or "hold it insufficient on the basis of inconsequential, technical deficiencies"); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (explaining that "[t]he APA requires courts to take 'due account of harmless error" and finding that notice violations under the Endangered Species Act were harmless); *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 527 (9th Cir. 1994) (holding that "even where there is a violation of NEPA's procedural requirements, relief will not be granted if the decision-maker was otherwise fully informed as to the environmental consequences and NEPA's goals were met"); *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 765 (9th Cir. 1986) (applying harmless error test to Management Act notice violations); *Cady v. Morton*, 527 F.2d 786, 796 (9th Cir. 1975) (holding that a court may not set aside an EIS because it "would have preferred a somewhat more detailed and better organized treatment").

Unlike these decisions and the decisions from other circuits on which Kaiser relies, this case is about *harmful* error. The majority concluded that

BLM did not properly value the public lands targeted for divestment or comply with NEPA's pivotal requirement to consider a reasonable range of alternatives to the proposed federal land transfer. These violations go to the very heart of the Management Act and NEPA, significantly undermining congressional policies embedded in both laws. The fact that BLM *could* come to the same decision after it remedies these major statutory violations does not mean that the agency's original errors were harmless.

In its attempt to squeeze this case into the "harmless error" box, Kaiser's petition mischaracterizes both the facts and the law. The provocative question it puts before the Court is whether a remand constitutes error when further proceedings "will have no effect on the agency's decision or serve any other substantive purpose." Cert. Pet. i. The obvious answer to that question is "yes," in the Ninth Circuit as elsewhere. But this is not such a case. Nothing in the majority decision or the record suggests that the remand will have "no effect" on BLM's decision, notwithstanding Kaiser's repetitive use of adjectives like "pointless," "meaningless," "inevitable," "futile," and "formalistic." The purpose of the remand is to ensure that BLM takes a fresh and more meaningful look at the value of the public lands to be exchanged and at alternative means of achieving the federal government's public land management objectives. The Court should assume that the agency will perform this review in good faith and that its new analysis will inform future decisions, just as Congress intended. *See Robertson*, 490 U.S. at 349 (explain that "NEPA ensures that important effects will not be overlooked

or underestimated" and "inevitably bring[s] pressure to bear on agencies 'to respond to the needs of environmental quality'").

Kaiser's argument, framed for the first time here as a circuit split, is built almost entirely on the erroneous premise that BLM's "public interest" finding ends the inquiry. It does not. The public interest requirement is but one hurdle that BLM must clear before disposing of public land, and a discretionary one at that. Once BLM takes the requisite hard look at alternative ways to achieve the objectives of the Management Act during remand, it may well decide that the public interest is better served by a different use of the targeted lands or that Los Angeles County's interest in additional desert landfill space beyond the new Mesquite Regional Landfill can be met on other, less sensitive land. BLM is not statutorily compelled to approve Kaiser's proposed land transfer or to privatize any public lands, especially those serving as buffer for precious wilderness resources. To the contrary, the Management Act strongly encourages retention of federal public land, making alienation the exception rather than the rule. There is thus no reason for any court to conclude that BLM will reach the same result on remand.

Ultimately, this case involves an ordinary challenge to an administrative agency decision where the court found serious reversible error. As such, it provides a poor vehicle for the Court to take up any legal question, let alone one that was not squarely presented below. On the merits, the Court would have to delve deeply into a 60,000-page factual record to determine whether the majority was correct in

finding legal error and whether each error identified below was nonetheless "harmless." And even were this Court to sit as a court of error and reverse the lower court's application of the law to the facts, it would not thereby clarify an unsettled question of federal law or resolve a circuit split because the Ninth Circuit already applies the same "harmless error" rule as other circuits when remand will serve no purpose. In short, nothing about this case warrants the Court's review.

I. The Majority Remanded BLM's Land Transfer Decision to Remedy Serious Legal Error that May Affect the Outcome of the Agency Decisionmaking Process.

Kaiser's petition turns on the unfounded assumption that remand of the NEPA and Management Act violations for further agency consideration serves no purpose because BLM will ignore the court's directive and blindly adhere to its prior conclusions. There is no support in the record for such an assumption, which "runs contrary to the presumption to which administrative agencies are entitled – that they will act properly and according to law." *F.C.C. v. Schreiber*, 381 U.S. 275, 296 (1965). The majority concluded that BLM engaged in significant legal errors, not trivial paperwork violations, and remanded for reconsideration of the land transfer decision once a proper appraisal and alternatives analysis are completed. BLM presumably will comply in good faith with that decision.

A. The Failure of the Yerke Appraisal to Consider the Land's Probable and Intended Use as a Landfill Was Not Harmless Error.

Kaiser's focus on the exclusion of the post-decisional Herzog report ignores the lower court's actual merits holding under the Management Act. The court carefully reviewed the record and applied its earlier *Desert Citizens* analysis to conclude that Mr. Yerke's appraisal, on which the Record of Decision was based, did not comply with the Management Act. Even if admitted into evidence, Mr. Herzog's *post hoc* opinion cannot salvage the Yerke appraisal because it suffers from the same fatal flaw.

The Management Act implementing regulations provide that "[h]ighest and best use means the most probable legal use of a property," and the Uniform Appraisal Standards applicable to federal land transactions define highest and best use as the "most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future." Pet. App. 15-16. Applying this standard, *Desert Citizens* held that the "existence of other landfill proposals in the region indicated a general market for landfill development." 231 F.3d at 1181. The same logic, the court held, necessarily follows here: "[W]e held in *Desert Citizens* that the presence of competing proposals alone is sufficient to establish market demand and financial feasibility. . . . If the Kaiser landfill proposal was sufficient to establish a reasonable probability of the Mesquite Landfill's financial feasibility, then Mesquite Landfill and other proposals must demonstrate similar feasibility of the Kaiser project." Pet. App. 18.

Defendants' argument below was that BLM's market analysis for Eagle Mountain did not show evidence of market demand. But this argument "misses the point entirely" because in *Desert Citizens*, the court "looked not to any BLM market analysis, but rather to the obvious and well-known presence of competing landfill proposals. . . . Indeed, [the court] found the appraiser's willful ignorance of facts of 'general notoriety' 'particularly troubling.'" Pet App. 18. Because here, as there, "it was the specific intent of the exchange that it be used for that purpose," the majority reiterated that "[t]here is no principled reason why the BLM, or any federal agency, should remain willfully blind to the value of federal lands by acting contrary to the most elementary principles of real estate transactions." *Id.* 20. Because the facts of this case are "virtually identical" to the facts in *Desert Citizens*, *id.* 17, BLM's appraisal and resulting decision to grant the land exchange violated the Management Act.

Mr. Herzog's *post hoc* litigation-driven opinion that the proposed landfill was not financially feasible due to lack of market demand or need for landfill capacity cannot cure this legal defect – and is plainly at odds with BLM's simultaneous determination that public need for landfill capacity outweighed protection of nearby wilderness resources. The theory advanced in Mr. Herzog's report is the same one advanced by the appraiser and rejected by the court in *Desert Citizens*. The court held that the posited "need" for landfill capacity – discussed at length in the Eagle Mountain EIS – driving this proposal and a number of others was dispositive evidence of market demand. The court's conclusion would not, therefore, have changed even if Mr.

Herzog's *post hoc* rationalization had been added to the Administrative Record for the decision.

Moreover, the dissent is incorrect when it says that the Herzog report was "formally made part of the administrative record." Pet. App. 96. The majority opinion concluded that the document was *not* properly part of the Administrative Record because it was prepared during litigation, years after the Record of Decision, to bolster and expand the Yerke appraisal. *See* Pet. App. 19, n.5. This Court has long held that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1972); *see also Fed. Power Comm'n v. Transcontinental Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (explaining that the Court has "consistently expressed the view that ordinarily review of administrative decisions is to be confined to 'consideration of the decision of the agency . . . and of the evidence on which it was based'" and holding that an agency decision which "is not sustainable on the administrative record made . . . must be vacated and the matter remanded . . . for further consideration"); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971). Thus, "[p]arties may not use 'post-decision information as a new rationalization either for sustaining or attacking the Agency's decision.'" *Center for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006) (citations omitted). The post-decisional Herzog report and internal memos prepared to rationalize BLM's earlier decision cannot, consistent with this precedent, properly be "made a part of the administrative record" for that decision.

On remand, BLM must revisit the legally defective appraisal methodology used by both Yerke and Herzog and develop a new valuation consistent with the Management Act. There is no evidence in the record to support Kaiser's conjecture that BLM will ignore the court's direction and "adhere to its decision so that further proceedings will be entirely futile." Cert. Pet. 25. That BLM *could*, in theory, brush aside the judicial interpretation and readopt the same valuation does not render the appraiser's error legally "harmless." At the very least, taxpayers and other concerned citizens must have the ability to administratively appeal or judicially challenge any decision based on a new appraisal.[8]

In sum, further review of the Management Act appraisal claim is not a simple matter. Minimally, the Court would have to (1) override longstanding precedent on the scope of administrative records, (2) consider and weigh competing post-decisional opinion testimony from BLM and the Charpied parties on the propriety of the Yerke appraisal methodology under BLM regulations and uniform federal appraisal standards, and (3) factually distinguish or overrule the Ninth Circuit's well-reasoned analysis in *Desert Citizens* – a result Kaiser does not seek in its petition.

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[8] The suggestion that BLM's internal review memos were "final, appealable decisions" gets no purchase either. Pet. App. 96. Those memos were prepared *three days* before they were submitted to the court, as exhibits to a summary judgment brief, to justify defendants' litigation position. NPCA vigorously objected to their admission into evidence at both the district and appellate courts. The notion that NPCA should or could have administratively appealed or challenged the memos in some other way is fatuous. Cert. Pet. 9, 25.

B. BLM's NEPA Violations Were Not Harmless Error.

Kaiser's "futility" argument is even less cogent as applied to BLM's NEPA violations. BLM's restrictive "purpose and need" statement and the resulting overly narrow alternatives analysis were not merely "error in an agency's formulation of a paragraph in an EIS," Cert. Pet. 26, and BLM did not just "technically err in this one summary paragraph." *Id.* 27. As the courts have held, although "[e]nvironmental impact statements take time and cost money . . . an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." Pet. App. 23-24 (quoting *Citizens Against Burlington*, 138 F.2d at 196).

Yet that is precisely what happened here. BLM considered in detail only the proposed land transfer, three alternate versions of the same transfer, and the statutorily required no-action alternative. The EIS expressly attributed this constricted alternatives analysis to the narrow project goals. Two "primary objectives" of the proposed transfer, the document explained, were to develop new landfill capacity for Southern California and "to obtain economic benefits from Kaisers' [sic] former Eagle Mountain Mine Site." Resp. App. 37. Thus, a landfill on other Kaiser property, waste diversion, alternative landfill locations, landfill mining, and alternative Townsite locations or uses "were not analyzed in detail because they do not meet the basic objectives of the Project

and/or are not within the jurisdiction of the County of Riverside." *Id.* That is, because the EIS essentially defined the purpose of the land exchange as "development of a landfill on federal land adjacent to the former Kaiser mining pits and Townsite," there was no viable alternative to Kaiser's proposal.

The majority correctly recognized that NEPA does not countenance such a tautology. While the applicant's purpose for the project "may provide useful background information . . . [i]t is the BLM purpose and need for the action that will dictate the range of alternatives." Pet App. 26-27. The purpose and need for any particular federal action necessarily is dictated by "the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives." *Id.* 25 (quoting *Citizens Against Burlington*, 983 F.2d at 196). Here, Congress' view is loud and clear. Federal public lands should be retained in federal ownership unless the public will be better served – indeed "well-served" – by their divestiture. 43 U.S.C. § 1716(a). Congressionally disfavored land transfers are appropriate only where the intended use of the disposed land will not significantly conflict with management objectives on remaining adjacent federal lands. 43 C.F.R. § 2200.0-6(b). Thus, in identifying alternatives to a land exchange whose purpose is to satisfy public landfill needs, BLM must evaluate other, less harmful options that do not impact Joshua Tree.

Given BLM's governing mandate under the Management Act, the majority properly concluded that Kaiser's private objectives – to provide income

from the mine site, to find a viable use for its mine waste and overburden, and to revive and develop the remote Townsite property – must be acknowledged and considered, but may not drive the exclusion of other viable alternatives from consideration or foreordain approval of the land exchange. Pet. App. 29. If NEPA is to serve its intended purpose of meaningfully informing agencies and the public, the EIS must "rigorously explore and objectively evaluate all reasonable alternatives" so that "reviewers may evaluate their comparative merits," including alternatives not within the agency's jurisdiction.[9] 40 C.F.R. § 1502.14. Here, BLM's narrowly drawn purpose and need statement sidestepped this statutory obligation. That error was hardly "harmless"; in remedying it, BLM may and should reconsider the wisdom of placing a massive garbage dump, with its attendant environmental, aesthetic, and recreational impacts, adjacent to Joshua Tree National Park, the crown jewel of desert wilderness experience.[10]

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[9] Kaiser's suggestion that an agency need not "study alternatives that it had no power to implement" misapprehends the law and the facts. Cert. Pet. 26. The NEPA regulations expressly require that an EIS consider "reasonable alternatives not within the jurisdiction of the lead agency." 40 C.F.R. § 1502.14(c). Moreover, it undoubtedly *is* within BLM's power to divest less sensitive land elsewhere in the Mojave Desert if there remains a need for more waste disposal capacity now that the Mesquite Regional Landfill is operational. *See* http://www.mrlf.org/.

[10] That the dissent did not agree with the majority's holding is clear, but Judge Trott's concern that "[a]gencies . . . are precluded from completely ignoring a private applicant's objectives" is misplaced. Pet. App. 47. The question

C. BLM's Public Interest Finding Does Not Render Its Other Statutory Violations "Harmless."

The dissent below and Kaiser here claim that BLM's "public interest" determination is sufficient to cure any other statutory violation. That notion is simply wrong. As the majority correctly understood, "whether the BLM gave full consideration to the [Management Act's] public interest factors, however, has no bearing on the sufficiency of the EIS." Pet. App. 29 n.9. Compliance with NEPA is the "means" to a fully informed "end," not "an empty and meaningless exercise in 'frivolous boilerplate.'" Cert. Pet. 30.

Kaiser's theory is that the Ninth Circuit "decisively settled" the question of whether the land exchange comports with the public interest, that "[BLM's] command [to undertake the land exchange] is not seriously contestable," that "there is no prospect that BLM will reverse its determination to do so," and that, therefore, any error in the NEPA alternatives analysis "did not affect the agency's judgment." Cert. Pet. 28-29. Each of these brash statements is incorrect.

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before the court was not whether a private party's economic interests can be ignored, but whether those interests can *dictate* the federal government's land management and retention options. The answer to that question surely is "no." Otherwise, a private party who wants to acquire or use federal land can effectively guarantee that outcome with a well-crafted sentence or two in the purpose and need statement, circumventing the whole purpose of NEPA.

First, although the court found BLM's interpretation of its own regulations implementing the public interest requirement to be "permissible," it certainly did not hold that the public interest determination was "decisive" of anything. Indeed, the majority noted that while it did "not necessarily agree with the BLM's public interest determination," it was constrained by its judicial review role to defer to the agency's construction of the statute. Pet. App. 21-22. Nothing in the holding or the record suggests that BLM must reach the same conclusion next time, when it has before it a more robust evaluation of alternatives that might better serve the public interest.

Second, Kaiser's assertion that BLM's public interest finding or the Management Act itself "command[s]" the agency to undertake the land exchange badly misreads the law. As explained above, the overarching policy behind the Management Act is to *retain* public lands and manage them for their "scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. § 1701(a)(8). Land exchanges constitute a tightly circumscribed discretionary exception to this policy, not a statutory command or private right. The law does not in any way compel BLM to grant a land exchange, even one that has some public benefit. The public interest determination is thus a necessary but not sufficient prerequisite for the outcome Kaiser seeks.

Third, there is nothing in the record or the law to support Kaiser's brazen assertion that there is "no prospect" that BLM will reverse its decision to grant

the land exchange. Kaiser may believe it has captured the agency, but the courts must assume that BLM will act in good faith in responding to the Ninth Circuit's decision on remand. Hoped-for agency intransigence in the face of a judicial directive cannot possibly be the basis for a "harmless error" determination.

Finally and most important, Kaiser's assertion that the NEPA violations did not affect BLM's judgment cannot be squared with the law or the facts here. As this Court explained in *Robertson*, "[NEPA's] procedures are almost certain to affect the agency's substantive decision." 490 U.S. at 350. The very purpose of NEPA's procedural requirements is to "infuse" our "broad national commitment to protecting and promoting environmental quality" into the "ongoing programs and actions of the Federal Government." *Id.* at 348. NEPA achieves this objective through the "action-forcing" vehicle of an EIS, which ensures that agencies do not overlook environmental consequences or possible alternatives and "gives the public assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process.'" *Id.* at 349. The error here was not a meaningless paperwork violation; it was a pernicious failure to consider other ways that BLM might satisfy its various competing Management Act obligations.

II. Because the Ninth Circuit Already Follows the "Harmless Error" Rule, There Is No Conflict Among Circuits or With This Court's Precedent.

Kaiser's petition is spun from the fiction that the Ninth Circuit refuses to embrace a "harmless error" rule when reviewing administrative agency decisions. This contention is particularly ironic given that Kaiser argued in its petition for rehearing *en banc* (on the issue of eutrophication) that the Ninth Circuit *does* apply a harmless error test, citing *Churchill County v. Norton*, 276 F.3d at 1081, *Cady v. Morton*, 527 F.2d at 796, and similar NEPA cases. Defendant-Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc* 13. Specifically, the Ninth Circuit employs the harmless error rule "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached." *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004) (quoting *Buschmann v. Schweiker*, 676 F.2d 352, 358 (9th Cir. 1982)).

Much like this Court and others, the Ninth Circuit has carefully and prudently shaped the contours of the harmless error doctrine:

> The APA requires that we take "due account" of the harmless error rule. *See* 5 U.S.C. § 706. It's true, as plaintiffs argue, that we must exercise great caution in applying the harmless error rule in the administrative rulemaking context. The reason is apparent: Harmless error is more readily abused there than in the civil or criminal trial context. An

> agency is not required to adopt a rule that conforms in any way to the comments presented to it. So long as it explains its reasons, it may adopt a rule that all commentators think is stupid or unnecessary. Thus, if the harmless error rule were to look solely to result, an agency could always claim that it would have adopted the same rule even if it had complied with the APA procedures. To avoid gutting the APA's procedural requirements, harmless error analysis in administrative rulemaking must therefore focus on the process as well as the result.

Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1497 (9th Cir. 1992).

The Ninth Circuit does not hesitate to apply this rule in appropriate NEPA cases. In *Friends of the Clearwater v. Dombeck*, 222 F.3d 552 (9th Cir. 2000), for instance, the agency initially failed to evaluate new, post-decisional information to determine whether a supplemental EIS was required. The Ninth Circuit nonetheless declined to enjoin the underlying agency action because, during the course of the litigation, the agency took a "hard look" at the new data and determined that they were not sufficiently significant to warrant a supplemental EIS under NEPA's governing standard. *Id.* at 560 (citing *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1025-26 (9th Cir. 1980), which held, on a similar claim, that it would be pointless to order the supplemental study of new information that had since been completed). Thus, where remand will truly have no effect because the agency has already

completed the missing analysis, the Ninth Circuit invokes the harmless error rule. That is not the situation in this case, however.

The Ninth Circuit's approach differs not at all from precedent elsewhere. This Court applies a harmless error rule to agency decisions "when a mistake of the administrative body is one that clearly has no bearing on the procedure used or the substance of the decision reached." *Mass. Trustees of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 248 (1964). It recently followed this approach in *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), where challengers argued that EPA's transfer of the Clean Water Act permitting program to the State of Arizona failed to satisfy the consultation requirements of the Endangered Species Act. Although EPA voluntarily sought consultation before making the decision, the agency subsequently changed its mind and concluded that no consultation was required by law, an interpretation upheld by the Court. *Id.* at 660. Thus, remand of the matter to EPA for further clarification of this "internal inconsistency" was not warranted as it "could have had no effect on the underlying agency action being challenged." *Id.* at 659. A similar question of the agency's legal authority animated the harmless error discussion in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (declining to remand enforcement order which incorrectly cited an adjudicatory "rule" from another case when agency "unquestionably" had independent legal authority to enforce the challenged order, meaning "[t]here is not the slightest uncertainty as to the outcome of a proceeding before the Board, whether the Board acted through a rule or an order."). Thus, the decisions of

this Court to which Kaiser cites are not at odds with the Ninth Circuit's formulation of the harmless error rule.

The same is true of Kaiser's authority from other circuits, specifically including the D.C., First, Seventh, and Eighth Circuits. Cert. Pet. 20-24. In *Nevada v. Dep't of Energy*, 457 F.3d 78 (D.C. Cir. 2006), the EIS evaluated a variety of truck and rail haul alternatives for a nuclear disposal project, but did not specify the agency's preferred alternative. The court found this error harmless because the agency subsequently announced its preferred alternative in the Federal Register, "thereby allowing the public to address comments more specifically to that" alternative and ensuring that "relevant information [was] available to those participating in agency decision-making." *Id.* at 90-91 (citing, among other cases, the Ninth Circuit's harmless error holding in *Laguna Greenbelt*, 42 F.3d at 527).

In *Save Our Heritage, Inc. v. F.A.A.*, 269 F.3d 49 (1st Cir. 2001), the court reviewed and affirmed the agency's conclusion that the project did not warrant an EIS, although that conclusion was not articulated in a formal "finding of no significant impact." The court declined to remand "for a differently named assessment, where the project's negative consequences have already been analyzed and found to be absent and the findings have been disclosed to interested parties," noting that "[i]f there was error in denominating the assessment, it was patently harmless." *Id.* at 62.

In the two-page *Glisson v. U.S. Forest Service*, 138 F.3d 1181 (7th Cir. 1998), challengers complained that the environmental assessment for a

restoration project did not discuss an inconsistency with state law, as required by the NEPA regulations. The court refused to remand on this ground, explaining that even if the assessment had discussed the state law, "it would doubtless have concluded that since the State of Illinois has approved the ecological-restoration project and has never indicated that it considers the shortleaf pines . . . endangered, and since two substantial stands of native shortleaf pines . . . . will remain, the impact on the pines is not an adequate reason for blocking the project." *Id.* at 1183.

And in *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1129 (8th Cir. 1999), the EIS sufficiently evaluated "ten alternative [wilderness management] plans" based on different "visitor use levels." The case does not stand, as Kaiser asserts, for the proposition that an error in failing to study unviable alternatives is harmless. Cert. Pet. 24. Rather, the Eighth Circuit found that the EIS considered a reasonable range of alternatives to the preferred plan because it evaluated alternatives for current, increased, and decreased use, as well as an alternative that would redistribute existing use. Given that visitor use levels were already straining wilderness resources and degrading recreational experiences, the court concluded that NEPA did not require consideration of any additional increased-use scenarios. *Id.* In short, there was no NEPA error, harmless or otherwise. [11]

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[11] Without discussion, Kaiser also misleadingly quotes *Friends of the River v. F.E.R.C.*, 720 F.2d 93 (D.C. Cir. 1983). There, the D.C. Circuit admonished that "courts have low tolerance for futility arguments" in NEPA cases, but explained

Unlike each of Kaiser's cited cases, the majority here found substantial procedural and substantive error. Thus, the issue is not whether the Ninth Circuit refused to employ a harmless error test or engaged in fly-specking.[12] It did neither. The issue is whether the fact-based finding of *harmful* error merits this Court's review. NPCA respectfully submits that it does not.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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that the "special circumstances" before it warranted a different result because there was a "cogent demonstration . . . that the agency gave due consideration to the relevant environmental factors and made that consideration manifest in an accessible, intelligible form" *before* making the final decision. *Id.* at , 106-08.

[12] Ironically, Kaiser cites *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683 (10th Cir. 2008), as "indistinguishable" from this case. Cert. Pet. 28. Noting that NEPA requirements "are not ones that we are free to disregard," that court held that failure to consider a reasonable range of alternatives "was more than a mere flyspeck and thwarted NEPA's purposes"; it thus *remanded* for further analysis even while acknowledging that "BLM is not precluded from making the same determination again." *Id.* at 715.

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM ENVIRONMENTAL IMPACT STATEMENT

1.1 Historical Setting and General Project Description

Mine Reclamation Corporation (MRC) and Kaiser Eagle Mountain Inc., a wholly-owned subsidiary of Kaiser Ventures Inc., propose to develop the Eagle Mountain Project on a portion of the Kaiser Eagle Mountain Mine in the County of Riverside, California. Kaiser owns portions of the Project site in fee; the portions of the site not owned in fee by Kaiser are owned by the United States Government and administered by the BLM. Kaiser also holds unpatented mining claims on portions of the land administered by the BLM. The BLM lands within the Project site are proposed to be conveyed in fee to Kaiser by the BLM as pan of the land exchange. (These exchange lands are discussed and illustrated in Section 2.1.1.)

The Eagle Mountain Project comprises two major features: (1) a Class III nonhazardous municipal solid waste landfill (Eagle Mountain Landfill) proposed to be operated by MRC: and (2) the resulting renovation and subsequent repopulation of the existing, adjacent Eagle Mountain Townsite (Townsite) owned by Kaiser. The landfill will receive waste primarily by rail. To effect the proposed Project, the proposed action involves the approval of a land exchange between Kaiser and BLM, the issuance of two right-of-way grants from the BLM to Kaiser, and the approval of land use applications for the landfill and the Townsite by the County. Figures 1-1 and 1-2 show the regional setting and the site location, respectively, of the Eagle Mountain Project. Kaiser has leased a portion of the mine site to MRC for the development and operation of the Eagle Mountain Landfill.

1.1.1 Historical Mining Activity

The Eagle Mountain open-pit iron-ore mine was operated by Kaiser Steel Corporation predecessor of Kaiser Ventures Inc.) on a full-time basis from 1948 to 1983. During that time, Kaiser recovered from four pits (i.e., East Pit. Central Pit, Black Eagle Pit [North], and Black Eagle Pit [South]) over 940 million tons of material, consisting of approximately 228 million tons of crude ore and 712 million tons of waste rock at rates of up to 59 million tons of material annually. From that crude ore, approximately 114 million tons of marketable concentrates were produced onsite and shipped from the property for steel making. The waste rock (i.e., randomly sized, non-iron-bearing rock that was excavated to gain access to the iron ore) remains onsite in overburden (waste) piles or disposal areas adjacent to the mining pits. The fine mine tailings, which comprise sand, silt, and clay remaining front the mined materials resulting from the ore concentrating operations remain in the impoundments constructed onsite. Although full-time operation of the mine was curtailed in 1983, Kaiser continues to engage in mining-related activities, including the sale and shipment of overburden as crushed rock and mixed rock product, the maintenance of equipment and roads, and the administration of Kaiser's mining claims. Kaiser's Eagle Mountain rail line was used for two shipments of iron ore in March 1993. The specific land use zoning of the mine site is discussed in Section 3.5. Land Use.

Over 5.500 acres of the mine site were disturbed by Kaiser Steel's mining operations. Although the disturbance predates the California Surface Mining and Reclamation Act (SMARA) a reclamation plan for the mine site was developed by Kaiser Steel in 1976 in

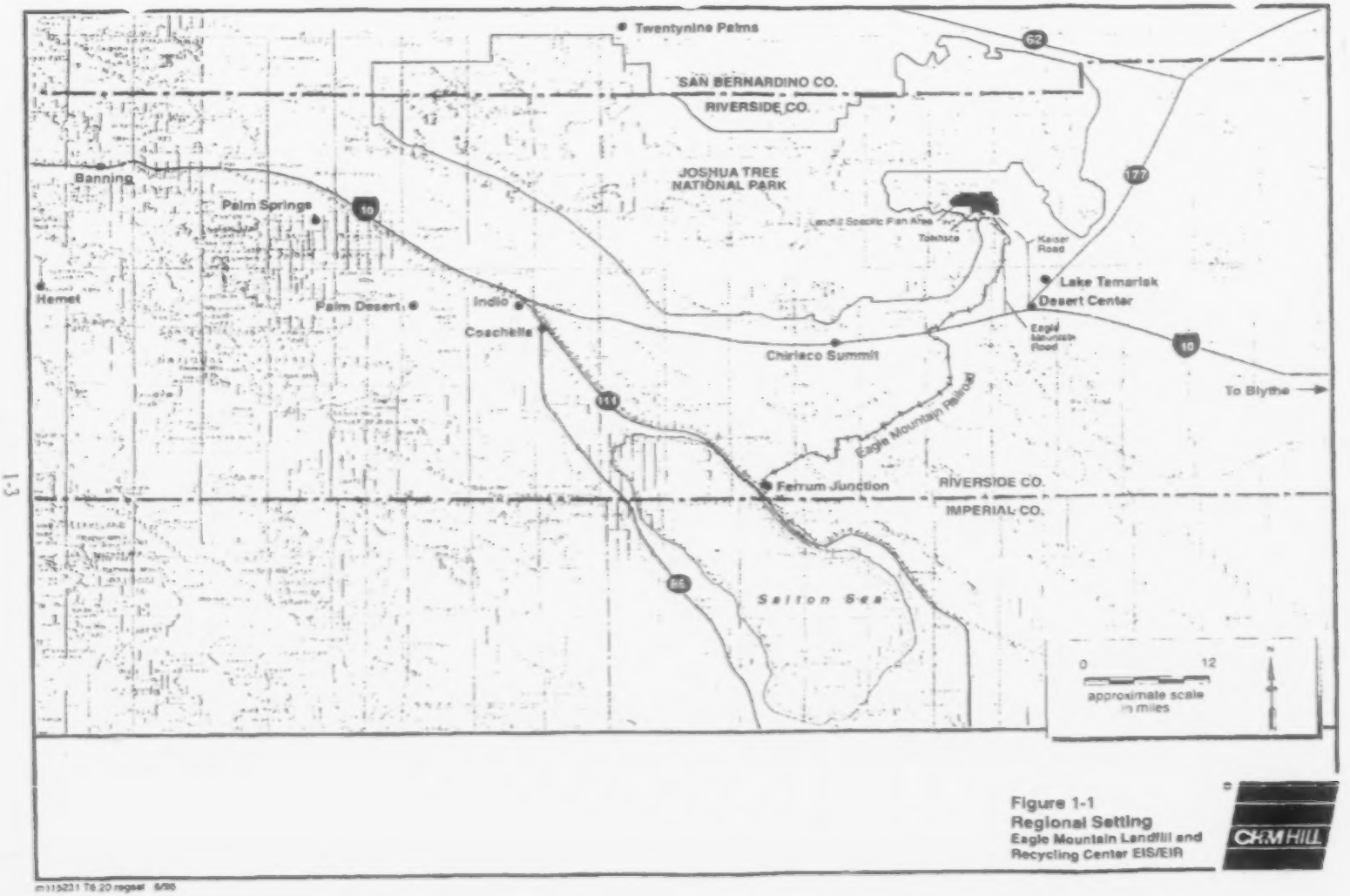

Figure 1-1
Regional Setting
Eagle Mountain Landfill and Recycling Center EIS/EIR

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response to SMARA and approved by the County of Riverside. The reclamation plan, however, requires only limited reclamation activities (e.g., removing equipment and buildings and limiting public access to the former mine site). The continuing implementation of the existing plan would result in the site remaining a disturbed area. The existing reclamation plan is proposed to be amended as part of the proposed County land use approvals (see Section 1.2.5). This amendment applies only to the area addressed by the Specific Plan for the landfill.

* * *

1.3.2.2 Project Proponents (Kaiser and MRC)

The primary objective of MRC, the proponent of the landfill component of the Project, is to construct and operate a Class DI nonhazardous municipal solid waste disposal facility that satisfies the following criteria:

- Is located on property owned or controlled by Kaiser, and/or on property that can be acquired by Kaiser through a land exchange
- Is located adjacent to transportation routes for which Kaiser possesses, or can acquire, all necessary rights-of-way
- Is located adjacent to the large quantities of mining overburden generated by former mining activities at the Kaiser mining site, so that such overburden can be used in construction of the landfill
- Satisfies all applicable environmental and permitting requirements for a Class non-hazardous municipal solid waste disposal facility

The primary purpose/objective of Kaiser, the proponent of the Townsite component of the Project and a significant investor in MRC, is to:

- Renovate and reuse existing structures in the Townsite, in a manner consistent with the construction and operation of the landfill
- Establish long-term land use and development of goals for the renovation and reuse of the Townsite
- Provide a long-term income source for a pension plan that supports retirees of the former Kaiser Steel Corporation

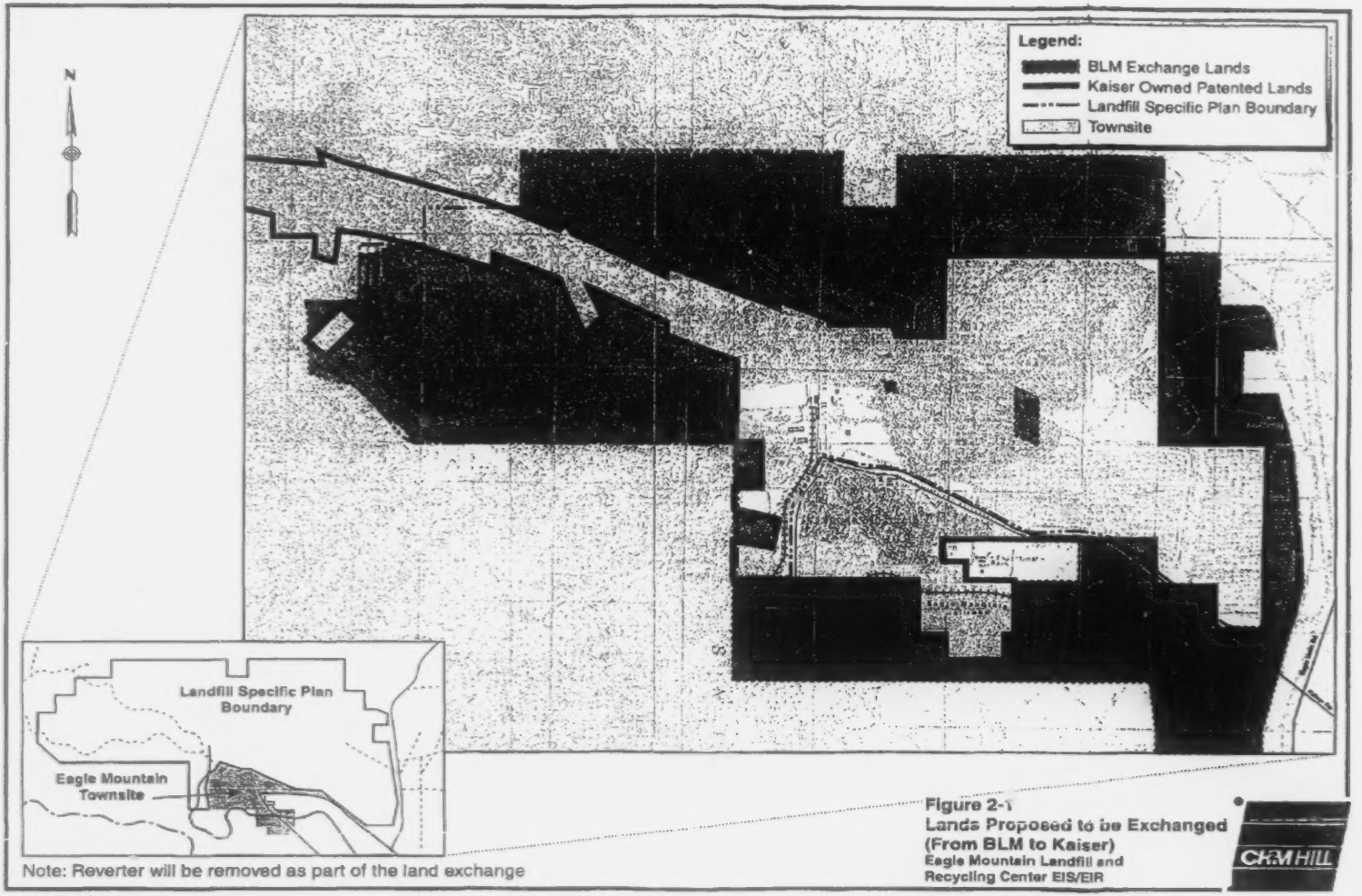

Figure 2-1
Lands Proposed to be Exchanged (From BLM to Kaiser)
Eagle Mountain Landfill and Recycling Center EIS/EIR

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2.1.1.1 Selected Lands (Lands to be Transferred from Bureau of Land Management to Kaiser)

Under FLPMA, the BLM will transfer approximately 3,481 acres of publicly owned lands in the Eagle Mountains to Kaiser. These selected lands fall within Sections 25-28 and 33-38, Township 3 S. Range 14 E; Sections 30 and 31, Township 3 S. Range 15 E; Sections 1, 2, 11, and 12; Township 4 S, Range 14 E; and Sections 6 and 7, Township 4 S, Range 15 E, San Bernardino Meridian (SBM). These selected lands, which are shown in Figure 2-1, include unencumbered parcels, lands currently encumbered with a variety of unpatented mining and millsite claims held by Kaiser, or lands in which the BLM has a reversionary interest. These claims would be relinquished by Kaiser upon conveyance of the lands by the BLM.

A Mineral Potential Evaluation was prepared for the previously prepared EIS/EIR and has been reviewed by the BLM for this EIS/EIR. A determination was made that conditions have not changed in mineral markets or demands that would change the previous conclusion that some of the selected public Sands are valuable for aggregate. The patent to Kaiser will be impressed with a mineral reservation for these lands.

2.1.1.2 Offered Lands (Lands to be Transferred to Bureau of Land Management by Kaiser)

The Kaiser-owned lands proposed for transfer to federal ownership (for administration by the BLM) consist of approximately 2,486 acres of lands located along the Kaiser-owned Eagle Mountain Railroad as it traverses northeast from Ferrum Junction (on the northeast shore of

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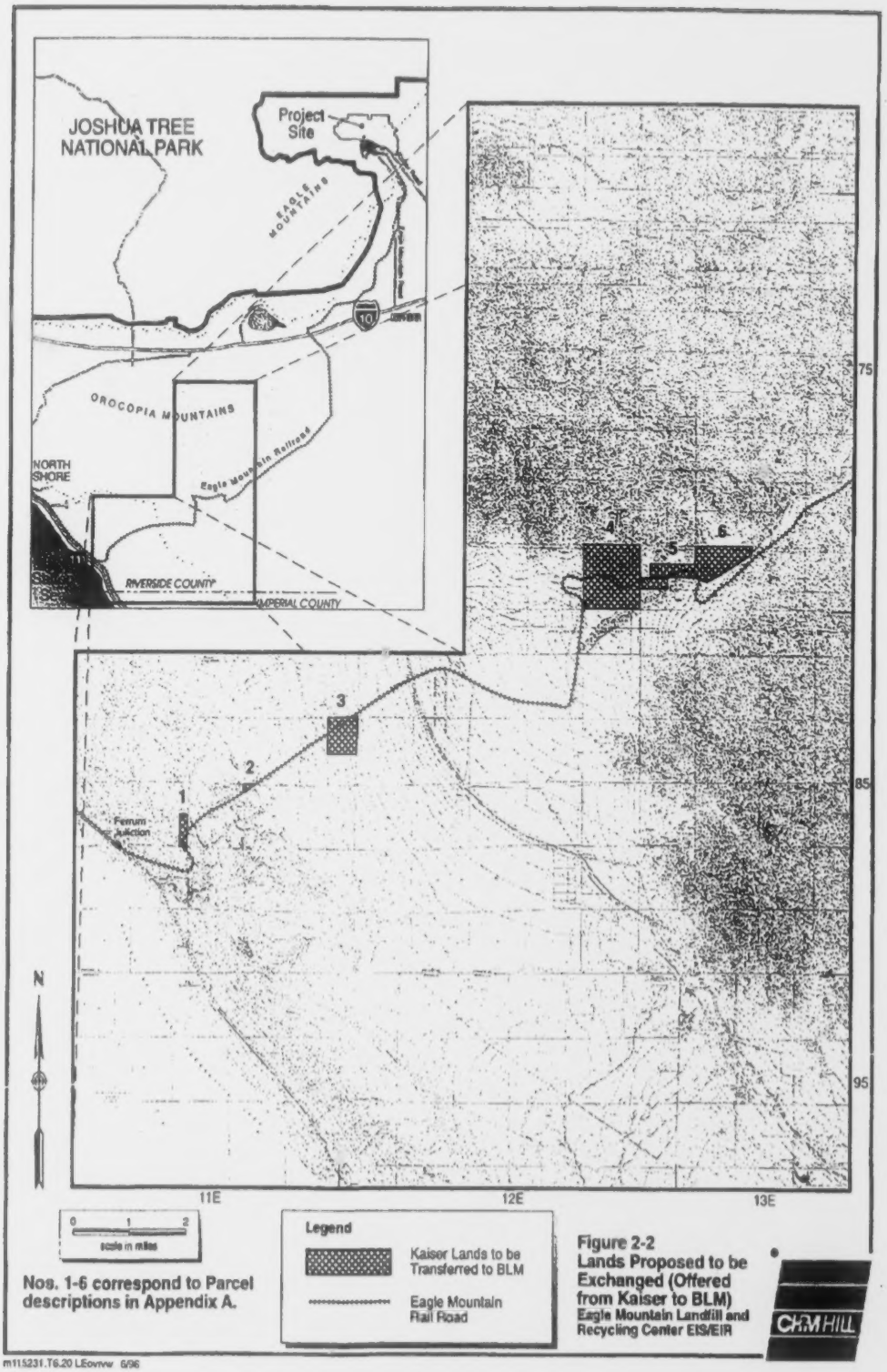

Nos. 1-6 correspond to Parcel descriptions in Appendix A.

Figure 2-2
Lands Proposed to be Exchanged (Offered from Kaiser to BLM)
Eagle Mountain Landfill and Recycling Center EIS/EIR

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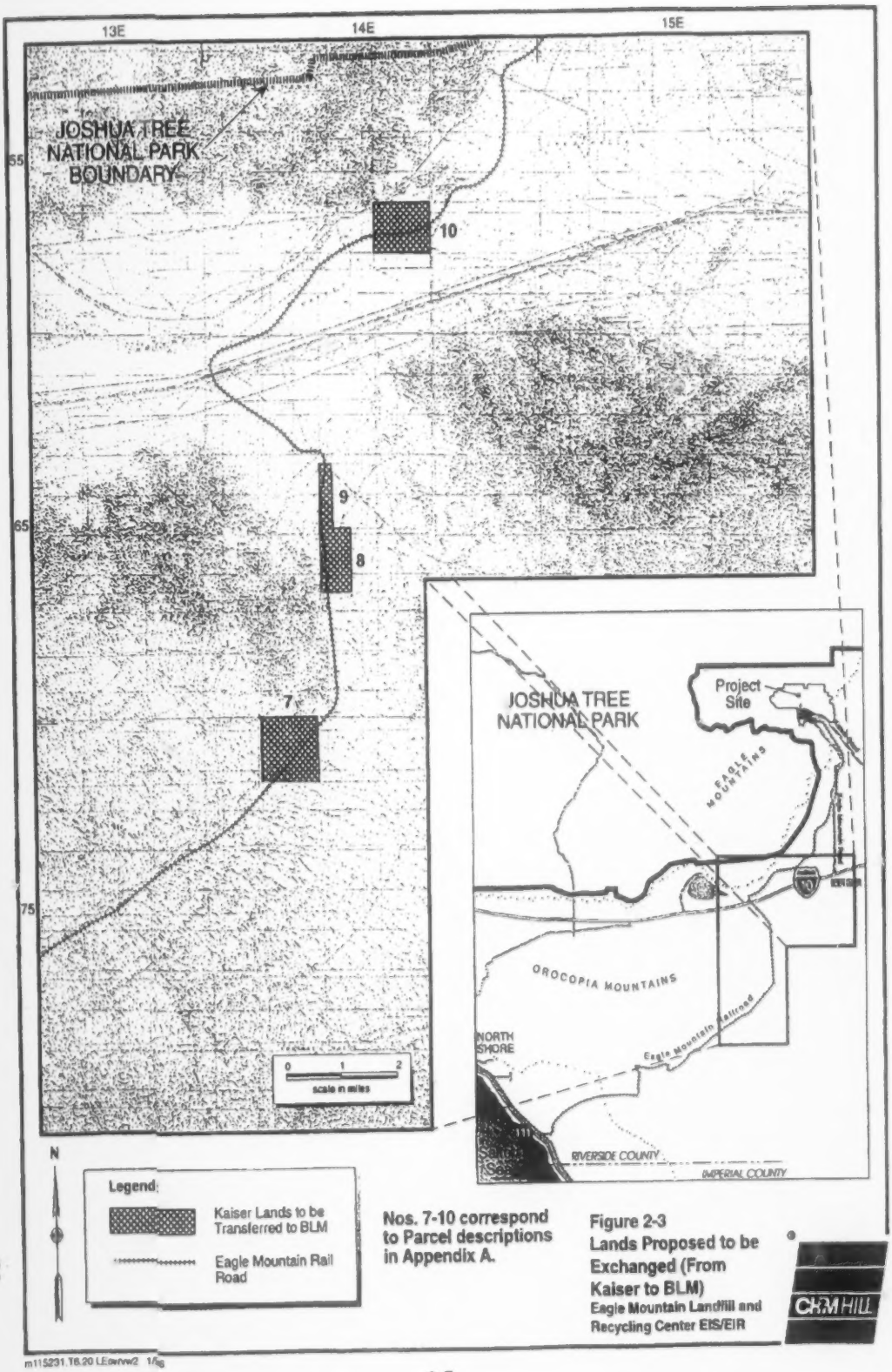

Nos. 7-10 correspond to Parcel descriptions in Appendix A.

Figure 2-3
Lands Proposed to be Exchanged (From Kaiser to BLM)
Eagle Mountain Landfill and Recycling Center EIS/EIR

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the Salton Sea) to just north of Interstate 10. Kaiser will reserve an easement (averaging 200 feet wide) in the deed to the United States for operation and maintenance of the railroad. These lands are shown in Figures 2-2 and 2-3. By effecting the land exchange, the BLM will acquire lands of prime habitat for the federal—and state-listed threatened desert tortoise. In addition, lands, and habitat for other federally endangered, threatened, and sensitive animal and plant species would be transferred to federal ownership (i.e., for the BLM's administration) to become part of a 20,000-acre nature preserve that includes the Salt Creek Area of Critical Environmental Concern. (Federal lands designated as Areas of Critical Environmental Concern are discussed further in Section 3.5, Land Use, and in Section 3.11, Wilderness.) Acquisition of these offered lands would .contribute to the BLM's goals of protecting sensitive species, result in more efficient management of the preserve area, and contribute to the BLM's efforts to promote biodiversity in the state. These lands will be managed by the BLM according to the appropriate guidance and policies, including the Desert Tortoise, Recovery Plans issued by the USFWS and the California Desert Conservation Area Plan and its future amendments.

2.1.1.3 Reverter Interest in Townsite Area and Rights-of-Way

In 1955, the BLM issued a patent to Kaiser Steel for a 460.63-acre parcel, including portions of the Townsite, subject to a reversion interest to the United States in the event that the property is not used for a period of 7 years as a camp site, mill site, or for other incidental purposes in connection with Kaiser Steel's mining operations. This patent, which was issued in accordance with Private Law 790

(PL 790), is now held by Kaiser Eagle Mountain, Inc. (i.e., Kaiser). Similarly, the existing right-of-way for Kaiser's Eagle Mountain Railroad and Eagle Mountain Road, which also was granted in accordance with PL 790, contains a reversion to the United States if the right-of-way is abandoned or is not used for a period of 7 years.

Although Kaiser has discontinued full-time mining operations at the Eagle Mountain Mine. Kaiser has continued to ship iron ore and other materials (e.g., aggregate and riprap) and has engaged in other activities incidental to mining at the Townsite, such as the maintenance of equipment and roads, administration, and annual assessment work in connection with the maintenance of Kaiser's mining claims. In March 1993, the railroad was used for two shipments of iron ore. The reversion interest of the United States in the 465-acre parcel around and including portions of the Townsite will be removed (i.e., conveyed) as part of the land exchange with Kaiser, and the existing legislative-right-of-way for the railroad and Eagle Mountain Road will be replaced with a new FLPMA right-of-way (see Section 2.1.2).

2.1.2 Federal Land Policy Management Act Roads and Railroad Right-of-Way Grants (Bureau of Land Management, Environmental Impact Statement)

Kaiser currently has a right-of-way for its private Eagle Mountain Railroad to the Project site and a right-of-way for the Eagle Mountain Road that was granted by the BLM pursuant to PL 790 on certain federal lands along the rail and roadways not already owned by Kaiser or where Kaiser has easements on private lands or permits from other federal agencies. Two proposed rights-of-way to be granted by the BLM to Kaiser, would be issued under FLPMA. The

first right-of-way (totaling approximately 28.6 miles over public lands) is for the existing Eagle Mountain Railroad that would replace the existing legislatively approved (i.e., PL 790) right-of-way. This proposed right-of-way also includes portions of land crossed by the rail spur proposed to be constructed from the existing Eagle Mountain Railroad to the Project's Planning Area 3 rail yard (i.e., Rail Yard II) and lands for the Eagle Mountain Road extension north of the pumping station operated by the Metropolitan Water District of Southern California (MWD) The second right-of-way (approximately 6.75 miles long) is proposed to be issued jointly to Kaiser and MWD for their use of the existing Eagle Mountain Road from Interstate 10 to, the MWD Pumping Station. These features are discussed below (also see Section 1.2.41 and shown in Figures 2-4, 2-5, and 2-6.

2.1.2.1, Eagle Mountain Road

The existing Eagle Mountain Road from the Interstate 10 interchange to MWD's Eagle Mountain Pumping Station is shown in Figure 2-4. Eagle Mountain Road begins in SE1/4 Section 30, Township 5 S. Range 15E, SBM, and runs almost due north ending in NE 1/4 Section 19, Township 4 S. Range 15 E. SBM, near MWD's Eagle Mountain Pumping Station. The paved road is currently maintained by the County of Riverside, authorized under Federal Revised Statutes, Section 2477. A right-of-way grant was previously authorized to Kaiser by the BLM pursuant to PL 790 (LA-121701). The proposed Project is to widen the existing two-lane, 20-foot-wide paved road to a two-lane, 32-foot-wide paved road. The total right-of-way for which Kaiser is applying is of variable width (averaging 110 feet wide) to allow for the paved roadway, shoulders, and berms and

drainage ditches. This portion of the right-of-way is approximately 6.75 miles long. The purpose of this road right-of-way is to serve as the main truck access route to the Eagle Mountain Landfill site.

2.1.2.2 Eagle Mountain Road Extension

The proposed Eagle Mountain Road extension is shown in Figure 2-5. The road will begin in NE1/4 Section 30. Township 4 S. Range 15 E. SBM, just south of the MWD Eagle Mountain Pumping Station and will continue to the northeast and then northwest before heading north to Kaiser Road. Approximately 1.5 miles of this proposed route are authorized under an existing right-of-way grant pursuant to PL 790 (LA-0121701) for mining-related purposes only. This partially existing dirt road is approximately 15 to 18 feet wide in most areas and is known locally as the Kaiser Truck Trail. This portion of the truck trail will be converted to a FLPMA right-of-way. The remainder of the Kaiser Truck Trail right-of-way will be relinquished by Kaiser, and Kaiser will maintain this road.

The proposed Project includes widening the existing portion and building a new 32-foot-wide paved road. The total width of the right-of-way for which Kaiser is applying is variable (averaging 110 feet wide) to allow for the paved roadway, shoulders, and berms. The proposed Eagle Mountain Road extension is approximately 6 miles long and crosses approximately 3 miles of public land requiring a right-of-way from the BLM. The remaining 3 miles is on private land or public land proposed to be conveyed to Kaiser by exchange.

* * *

2.1.2.3 Eagle Mountain Railroad

The existing 52-mile private Eagle Mountain Railroad intersects with the Southern Pacific rail system at Ferrum Junction and continues north to the mine site at Eagle Mountain. The right-of-way for which Kaiser is applying is of variable width (averaging 200 feet) with appurtenant areas for drainage structures. This railroad is shown in Figures 1-1 and 2-2 through 2-5. Approximately 28.6 miles of the rail line traverse federal lands managed by the BLM. The remainder of the Eagle Mountain Railroad is on other federal lands where Kaiser holds permits from other agencies, on private lands where Kaiser holds easements, or on Kaiser-owned lands that will be made subject to easements to be reserved by Kaiser when the lands are conveyed to the BLM through the land exchange.

Eagle Mountain Railroad passes through the northwestern portion of the Chocolate Mountain Gunnery Range, which is managed by the U.S. Navy. The existing right-of-way was granted by the BLM with the concurrence of the Navy on those portions of federal lands withdrawn by Public Land Order 281, as amended by Public Land Orders 2312 and 5759 for use by the Navy. The Secretary of Interior retained jurisdiction to issue, with the concurrence of the Navy, rights-of-way over the withdrawn lands. Kaiser holds a revocable permit from the Navy on former private lands that were acquired by the Navy. The FLPMA right-of-way addressed in this EIS/EIR also would be granted on the withdrawn lands with the concurrence of the Navy. The Navy gave its concurrence to issue the right-of-way grant (October 7, 1993). The Chocolate Mountains Aerial Gunnery Range was reauthorized (i.e., withdrawn) by Con-

gress by Title VIII of the California Desert Protection Act. Section 805(a)(3)(B) authorizes the Secretary of the Interior (through the BLM) to issue rights-of-way with the concurrence of the Secretary of the Navy.

The southern portion of the existing Eagle Mountain Railroad also passes through federal land (NW 1/4 Section 28, Township 8S, Range 11E) near Ferrum, which was withdrawn for the U.S. Bureau of Reclamation (BOR) Secretarial Order of October 19, 1920, for the Yuma Reclamation Project. By agreement with the BOR, the BLM is responsible for managing the resources and issues authorizations on these lands. The existing right-of-way (LA-0121701) was granted by the BLM with the concurrence of the BOR. The FLPMA right-of-way would also be granted on the withdrawn lands with the concurrence of the BOR. The BOR gave its concurrence to issue the right-of-way grant on June 11, 1993.

The rail line also traverses a portion of state-owned land patented under the Recreation and Public Purposes Act (43 U.S.C. 869) to the State of California for inclusion into the Salton Sea State Recreation Area in 1971. The patent was issued subject to Kaiser's existing right-of-way grant (LA-0121701) pursuant to PL 790; and contains a reversionary clause in favor of the United States if the lands are not used as a recreation area. Kaiser intends to replace the right-of-way with an easement granted by the state, with the concurrence of the BLM.

The railroad is authorized over BLM-managed public lands, lands withdrawn for the Navy and the BOR, and lands patented to the state under an existing right-of-way grant (LA-0121701) pursuant to PL 790 for mining-related activities. This right-of-way will be converted to a FLPMA right-of-way. The

granting of this right-of-way over public land would allow the use of the Eagle Mountain Railroad to carry trains for purposes other than mining (e.g., transport of refuse containers from the Southern Pacific line at Ferrum Junction to the proposed Rail Yard I and/or repair and maintenance facility [see Section 2.1.7.1]). At the beginning of landfill operations, no more than three trains per day would use this route to Rail Yard I (see Figure 2-5). As the landfill is developed (i.e., when the daily disposal capacity at the landfill site exceeds 10,000 tons per day), trains entering the landfill site will be routed east of the Eagle Mountain Townsite (see Section 2.1.3) into the proposed Rail Yard II (see Figure 2-6) via a railroad spur (see Section 2.1.2.4). Use of Rail Yard II would allow some or all of the rail traffic to be routed further from the Townsite. Rail Yards I and II can be used simultaneously to accommodate a total of up to six trains per day.

2.1.2.4, Eagle Mountain, Railroad Spar

The proposed new railroad spur, which is shown in Figure 2-6, will begin just past the location where the existing railroad crosses the Colorado River Aqueduct in S1/2 Section 7, Township 4 S, Range 15 E, SBM, and, extends to the north to the proposed Rail Yard Planning Area 3 in W1/2 Section 31. Township 3 S, Range 15 E, SBM. The rail spur will be approximately 2 miles long and is almost entirely on land proposed to be conveyed to Kaiser as part of the land exchange. The purpose of this spur is to route rail traffic east of the Townsite into the larger proposed Rail Yard II when daily waste disposal capacity exceeds 10,000 tons per day.

2.1.6.1 Phasing of Landfill Development

The Eagle Mountain Landfill will be developed as a single waste management unit using the canyon and pit fill method. The canyon and pit fill method consists of placing waste in canyons and/or pits that have been prepared to accept the waste by grading and construction of a liner system. The waste can be placed at the head (i.e., up slope) end of the canyon or it could be placed at the mouth (i.e., down slope) end of the canyon. Waste at the Eagle Mountain Landfill will be placed and compacted starting at the mouth of each canyon and the lowest (i.e., deepest) area of the pits. Surface water drainage systems will direct stormwater flow around the waste areas. Construction and accompanying operations will be implemented in five contiguous phases, generally from west to east. Each landfill phase will be separated into subphases to facilitate construction of the liner system and to optimize site operations. Each subphase will comprise from 10 to 30 acres, and the subphases generally will be developed from lower to higher elevations. Within the 10- to 30-acre subphase area, the active working area will be less than 2 acres (the exact acreage will depend on the daily volume of incoming waste). The five phases are shown in Figure 2-16.

As described previously, extensive site-specific technical studies have already been completed in support of this document, the previous EIS/EIR, and the ROWD (GeoSyntec, 1992). Prior to construction of each subphase, construction-level design will be completed and associated construction plans and specifications will be prepared and submitted to the

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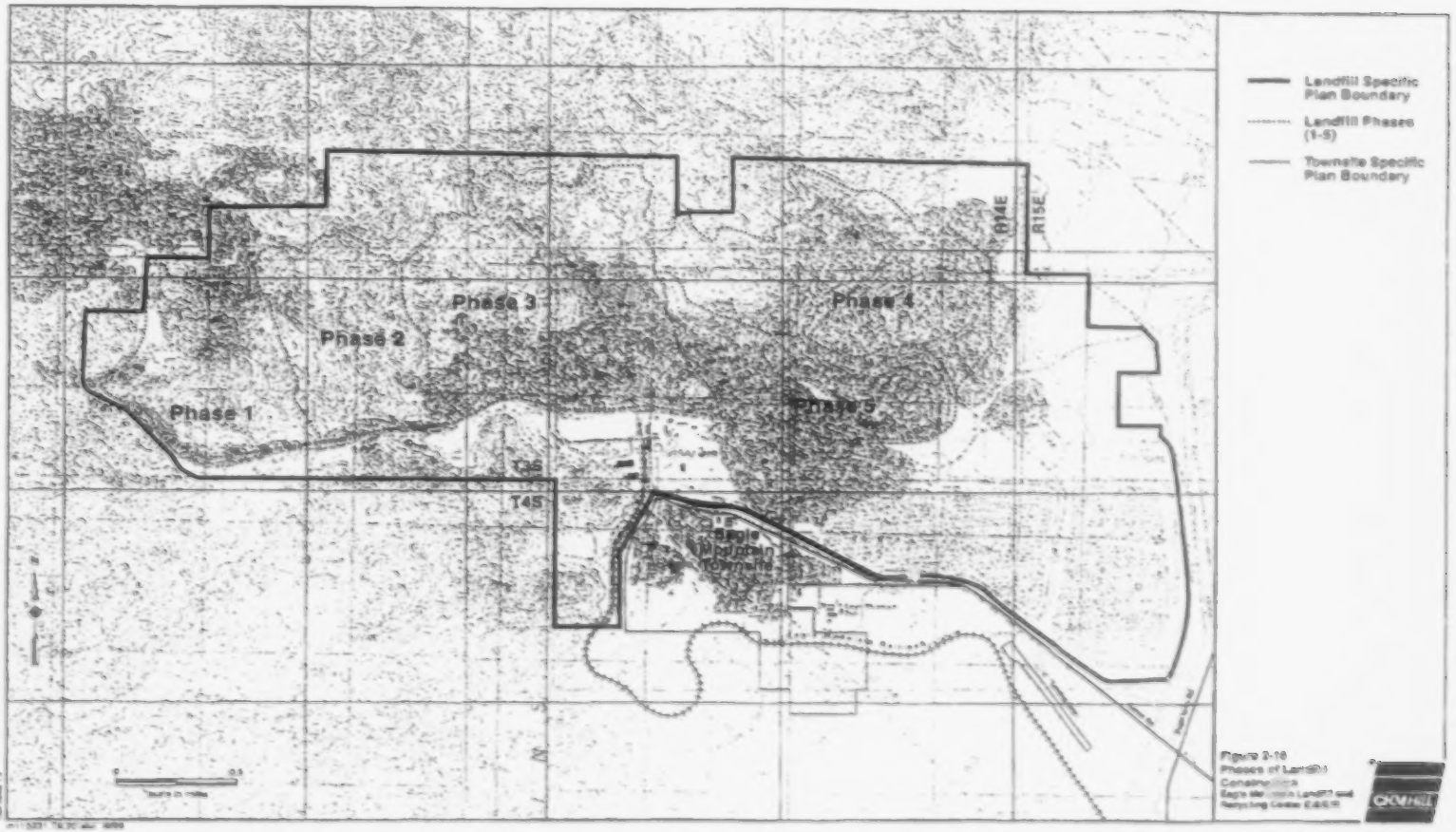

Figure 2-16
Phases of Landfill Construction
Eagle Mountain Landfill and Recycling Center EIR/EIS

Regional Water Quality Control Board (RWQCB) for review and approval. Construction-level design activities will include additional geologic, geotechnical, and hydrogeologic investigations. The data from these additional investigations will supplement existing site-specific data. Several of the technical areas for which additional data will be obtained during construction-level design activities are: (1) detailed geologic mapping; (2) subphase-specific geotechnical investigations; (3) subphase-specific slope stability analyses; and (4) development of a comprehensive Project construction quality assurance (CQA) plan. These areas are described below.

Subphase-specific geotechnical, geologic, and hydrogeologic investigations are planned as part of the construction-level design for each subphase of Eagle Mountain Landfill development. Design issues that will be further addressed during this stage of Project development will include:

- Detailed geologic mapping of all natural and cut slopes influencing each subphase will be conducted prior to construction. One function of the geologic mapping is to identify areas where adverse geologic conditions (e.g., fracture zones, out-of-slope bedding, fault zones, or other geologic discontinuities) could impact slope stability. Any adverse conditions identified during the mapping will be remediated during construction, as necessary. Remedial measures could include scaling (removal) of potentially unstable bedrock wedges or other unstable zones or stabilization of these areas using either structural measures (e.g., rock bolts, soil nailing, or ground anchors) or earthfill. Any required remedial measures

will be addressed in the construction plans and specifications prepared for each new subphase.

- Geologic field reconnaissances will also be performed to confirm that the subphase does not include any previously unmapped geologic structures (e.g., faults) that could provide preferential-flow pathways for groundwater past the point of compliance. Should such geologic structures be identified, they will be investigated. Groundwater monitoring-well locations will be adjusted as necessary to reflect the existence of such preferential-flow pathways. If necessary, additional wells will be added to the monitoring well network.

- Geotechnical investigations of each subphase area will be used to investigate the extent of alluvial and debris flow deposits. The geotechnical investigations will address the compressibility and collapse potential of alluvial materials and calculations will be performed to estimate the resulting total and differential settlements within each subphase. The potential for impacts to the containment system from these total and differential settlements will also be evaluated for each new subphase during the construction-level design. If the evaluation reveals a potential for significant impact on the performance of the containment system, the construction specifications
for that subphase will contain requirements for excavating unsuitable foundation materials and replacing them with compacted engineered

- Site-specific stability analyses of each slope in each subphase of development will also be analyzed during the construction-level design of each subphase. Field data will be obtained during construction-level design activities. At that time, site-specific geologic data (e.g., joint and shear orientations) will be incorporated into the geotechnical cross sections used for analyses of each slope. The results of these analyses will be presented in the design documentation prepared for each new subphase and submitted to the RWQCB for review and approval.

The construction-level design activities also will include the development of a comprehensive landfill CQA plan. The CQA plan will include provisions that require CQA personnel to confirm and document that various elements of the landfill are constructed in accordance with the plans and specifications. The CQA plan will also require monitoring, testing, and documenting liner system construction, and will provide a mechanism for identifying and correcting any observed problems. Over the past several years, CQA programs of the type described have become a standard part of municipal solid waste landfill construction projects. Provisions for CQA at the Eagle Mountain Landfill are provided in the RWQCB WDRs.

Phase 1. Phase 1 will start in the western end of the landfill. An area of about 319 acres will be graded, lined, and filled as this phase of the landfill is constructed. Liner elevations in Phase 1 will range from about 1,660 feet above sea level (based on the national geodetic vertical datum of 1929) at the lowest collection sump area to 2,750 feet above sea

level at the upslope northern end of the phase. Final cover elevations in Phase 1 will reach 2,750 feet above mean sea level. Interim waste slopes during the filling of Phase 1 will be up to 400 feet high at inclinations of up to 2H:1V (27 degree slope) measured for the horizontal. Final cover slopes will be approximately 1,000 feet high at an average inclination of 3.5H:1V (16 degree slope). Construction, filling, and progressive implementation of Phase 1 closure are expected to occur over a 17-year period.

Phase 2. Phase 2 of the Eagle Mountain Landfill will occupy an area of approximately 312 acres immediately east of Phase 1. Liner elevations in Phase 2 will range from about 1,540 feet above sea level at the lowest sump area to about 2,620 feet above sea level at the upslope northern end of the phase. Final cover elevations in Phase 2 will reach approximately 2,750 feet above sea level. Interim waste slopes during the filling of Phase 2 will be up to 400 feet high at inclinations of up to 2H: 1V. Final cover slopes in Phase 2 will be about 1,000 feet high at an overall inclination of 3.5H: 1V. Construction, filling, and progressive implementation of Phase 2 closure are expected to occur over an 11-year period.

Phase 3. Phase 3 of the landfill development will occur in a plan area of approximately 703 acres immediately east of Phase 2. Liner elevations in Phase 3 will range from about 1,060 feet above sea level at the lowest sump area to about 2,420 feet above sea level at the upslope northern end of the phase. Final cover elevations in Phase 3 will rise approximately 2,550 feet above sea level. Interim waste slopes during the filling of Phase 3 will be up to 400 feet high at inclinations of up to 2H:1V. Final cover slopes in Phase 3 will be about 1,300 feet high

at an overall inclination of 3.5H:1V. Construction, filling, and progressive implementation of Phase 3 closure are expected to occur over a 31-year period.

Phase 4. Phase 4 of the landfill development will occur immediately northeast of Phase 3. Phase 4 will cover a plan area of approximately 534 acres. Liner elevations in Phase 4 will range from about 1,030 feet above sea level at the southeast edge of the phase to about 2,000 feet above sea level at the upslope northwest corner of the phase. Final cover elevations in Phase 4 will rise approximately 2,120 feet above sea level. Interim waste slopes during the filling of Phase 4 will be up to 400 feet high at inclinations of up to 2H:1V. Final cover slopes in Phase 4 will reach heights of about 700 feet. Final cover slopes will have average inclinations of 3.5H:1V. Construction, filling, and progressive implementation of Phase 4 closure will occur over a 19-year period.

Phase 5. Phase 5 of the landfill development comprises most of the East Pit. Phase 5 will be situated southeast of Phase 3 and south of Phase 4. Phase 5 will cover a plan area of about 289 acres. In addition, Phase 5 disposal operations will also extend over portions of Phases 3 and 4. Liner elevations in Phase 5 will range from about 940 feet above sea level in the western portion of the phase to about 830 feet above sea level in the eastern portion of the phase. The final cover slope in Phase 5 will reach heights of just above 2,200 feet and will be inclined at an average of 3.5H:1V. Construction, filling, and progressive implementation of Phase 5 closure will occur over a period of approximately 39 years.

* * *

2.2 Description of the Proposed Action

Mine Reclamation Corporation (MRC) and Kaiser Eagle Mountain, Inc., wholly-owned subsidiaries of Kaiser Ventures Inc., propose to develop the Eagle Mountain Project on a portion of the Kaiser Eagle Mountain Mine in the County of Riverside, California (Figure 2-1). Kaiser currently owns portions of the Project site; the remainder of the site is owned by the United States Government but subject to Kaiser mining claims. These federally owned lands are proposed to be conveyed to Kaiser by the BLM in exchange for lands owned by Kaiser along the existing Eagle Mountain Railroad. Portions of the proposed landfill site are within the Eagle Mountains, and the site is bordered on the north, west, and southwest by Joshua Tree National Park (JTNP), and on the east and southeast by the Chuckwalla Valley. The legal description of the BLM lands to be transferred to Kaiser is in Appendix Z.

The proposed Eagle Mountain Project includes two major components: (1) development of a Class III nonhazardous municipal solid waste landfill to be operated by MRC, and (2) the renovation and subsequent repopulation of the existing Eagle Mountain Townsite (Townsite), which is owned by Kaiser, adjacent to the proposed landfill site.

2.2.1 Eagle Mountain Landfill

The Eagle Mountain Landfill is proposed to be primarily a waste-by-rail facility, designed to meet a significant portion of Southern California's long-term municipal solid waste disposal needs. Figure 2-2 shows the projected waste flow volumes for the seven-county wasteshed area in Southern California during the anticipated life of the Project. The ana-

lyses conducted for this EIS/EIR are based on a total landfill life of approximately 117 years. The amount of waste anticipated to be accepted at the proposed landfill will increase incrementally during the first 25 years of operation: approximately 4,500 tons per day (tpd) for Years 1 through 4; 8,200 tpd for Years 5 through 9; 12,100 tpd from Year 10 through 14; and 16,000 tpd for Years 15 through 24. After this time, the landfill is anticipated to accept up to 20,000 tpd of municipal solid waste for the remaining years of operation. The total disposal capacity of the landfill will be approximately 708 million tons.

The site of the proposed Project is bordered on the north, west, and southwest by the JTNP and Eagle Mountains, and on the east and southeast by the Chuckwalla Valley. The southern boundary of JTNP in the Pinto Basin lies within approximately 1.5 miles of the Eagle Mountain Project site. The site of the proposed landfill encompasses approximately 4,654 acres. Of this acreage, approximately half (2,164 acres) will be used for actual disposal of waste, while the remaining acreage (approximately 2,490 acres) will be used for buffer areas and ancillary facilities. The majority of the waste to be received at the landfill will be transported by train via the Union Pacific (formerly the Southern Pacific) rail system and an existing 52-mile, Kaiser-owned rail line that extends from Ferrum Junction to the Eagle Mountain Mine. Of the remaining waste received at the proposed landfill and not transported by train, most will be transported by transfer trucks in enclosed waste-haul trailers; only a small percentage of waste will be accepted at the landfill site from self-haul, commercial operations serving local communities within the Chuckwalla Valley area. Waste transported to the

Project site, whether by train or by transfer truck, will be transported in enclosed containers.

2.2.2 Eagle Mountain Townsite

The Eagle Mountain Project also includes the planned renovation and repopulation of the adjacent Kaiser-owned Townsite to provide housing for landfill workers and their families. The Townsite is an existing, but underutilized, former mining community located directly south of the Eagle Mountain Landfill site on approximately 429 acres. At the height of mining operations in the 1960s and 1970s, approximately 3,700 people lived in the Townsite. The Townsite contained residential development, schools, churches, commercial development, and a full range of utilities and services. Currently located in the Townsite is a privately operated community correctional facility that operates under a Public Use Permit from the County of Riverside and under contract with the California Department of Corrections.

* * *

2.2.3 Land Exchange

In the proposed land exchange, BLM would convey to Kaiser approximately 3,481 acres of public land plus BLM's reversionary interest in a 465-acre parcel known as the Kaiser campsite (collectively, the "Selected Lands"). All of the selected lands are located within the Project site, and a substantial portion of them have been severely disturbed by past mining operations. In addition, a substantial portion of the Selected Lands are subject to unpatented mining claims held by Kaiser. In return for these lands, Kaiser would convey to BLM approximately 2,846 acres of land containing sensitive habitat

currently owned by Kaiser (the "Offered Lands"). The Offered Lands are located adjacent to the Eagle Mountain Railroad, outside the proposed landfill site itself, and provide habitat for sensitive species such as the desert tortoise and the desert pupfish.

In addition to the land exchange, the Project proponents have applied for two right-of-way grants. The first right-of-way is for approximately 28.6 miles of the 52-mile Eagle Mountain Railroad line, which would be used by trains traveling to the Project site. This right-of-way would be issued pursuant to the Federal Land Policy and Management Act of 1976 (as amended) and would replace an existing right-of-way that was issued pursuant to Private Law (PL) 790. The second right-of-way is for approximately 6.75 miles of Eagle Mountain Road, which would be used by trucks traveling to the Project site. This right-of-way would also be issued pursuant to FLPMA, and would be held jointly by Kaiser and the Metropolitan Water District (MWD). Both rights-of-way would be issued subject to the terms and conditions imposed on their use by BLM, including mitigation requirements.

2.3 Alternatives Considered in Detail

2.3.1 No Action Alternative

The No Action Alternative would leave the Eagle Mountain iron-ore mine site in its present condition, and the landfill would not be developed. The limited mining-related activities associated with the former mining operations would be maintained and the existing mining reclamation plan would continue to be implemented. Southern California communities would continue to rely on existing, expanded, or other new landfills. The No Action Alternative would leave the Townsite in its present condition, and no further

renovation beyond existing approved uses or that permitted and/or subject to approval would occur. The rights-of-way would not be issued, and the land exchange between the BLM and Kaiser would not occur. The other objectives listed in Section 1.3.2.1 of the Draft EIS/EIR would not be realized if the No Action Alternative were chosen.

2.3.2 Reduced Volume of Onsite Disposal Alternative

This alternative would allow for the disposal of up to 16,000 tpd of waste including up to 14,000 tpd by rail and up to 2,000 tpd by truck. The landfill operating conditions would be similar to the proposed Project. The rights-of-way would be issued, and the land exchange between the BLM and Kaiser would occur.

2.3.3 Alternate Road Access Alternative

Under this alternative, transfer trucks would use the existing Kaiser Road to bring waste to the site instead of the existing Eagle Mountain Road and its proposed extension. Because Eagle Mountain Road would not be used, no new construction of the proposed Eagle Mountain Road extension would occur. All other landfill activities of the proposed Project would remain the same. The proposed renovation of the Townsite would proceed as in the Proposed Action. The rights-of-way would be issued, and the land exchange between the BLM and Kaiser would occur.

2.3.4 Rail Access Only Alternative

This alternative would eliminate the use of all non-Chuckwalla Valley refuse-hauling trucks to the proposed site, resulting in a reduction in the capacity of the landfill to 18,000 tpd. All other landfill activities of the proposed Project would remain the same.

The proposed renovation of the Townsite would proceed as in the Proposed Action. The railroad right-of-way would be issued, and the land exchange between the BLM and Kaiser would occur.

2.3.5 Landfill on Kaiser Land Only Alternative

This alternative would allow for operation of the proposed landfill without implementing the proposed land exchange between the BLM and Kaiser. There would, however, be a modified land exchange involving a reversionary interest in some of the lands needed for the landfill and the Townsite, and the proposed rights-of-way would still be implemented. The landfill would comprise only Kaiser-owned lands in and around the East Pit (Phase 5 of landfill development under the Proposed Action). The landfill footprint would cover an area of approximately 289 acres and would accept a maximum of 10,000 tpd of municipal solid waste. Landfill design, development, operation, environmental monitoring, and closure and postclosure would be as described for the Proposed Action. The final grades for this alternative would result in an airspace of almost 183 million cubic yards (151 million tons). This alternative would have an estimated site life of 39 years. The proposed renovation of the Townsite would proceed as in the Proposed Action and the rights-of-way would be issued.

2.3.6 Landfill Development/No Townsite Development Alternative

Under this alternative, the landfill portion of the proposed Project would proceed as proposed, but the Townsite Specific Plan would not be approved, and renovation of existing structures of the Townsite

would not occur within the existing Townsite. No improvements to existing conditions would be made within the Townsite, but federal land use approvals would proceed (i.e., the rights-of-way would be issued and the land exchange between the BLM and Kaiser would occur). The existing Townsite would remain essentially unchanged from the existing condition.

2.4 Alternatives Considered but Eliminated from Further Consideration

In addition to the alternatives discussed above and evaluated in this EIS/EIR, a number of other possible alternatives were considered but eliminated from further consideration because it was determined that they would not reasonably or feasibly accomplish the primary objectives of the Proposed Action. The following eliminated alternatives are discussed in this EIS/EIR: JO Landfill on Other Kaiser Property; (2) Waste Diversion; (3) Proposed Offsite Landfill Locations; (4) Landfill Mining; (5) Alternative Townsite Locations; (6) Alternative Townsite Land Use and Densities.

3.5.1 Existing Land Uses of the Project Site

3.5.1.1 General Setting

The Project site is located in eastern Riverside County approximately 60 miles east of Indio and 50 miles west of Blythe. The Project site is situated in the foothills of the Eagle Mountains at the site of Kaiser's Eagle Mountain open-pit, iron-ore mine, which operated on a full-time basis from 1948 to 1983. The mine site is bordered on the north, west, and southwest by the Eagle Mountains and on the east and southeast by the Chuckwalla Valley. The proposed Project site is within approximately 1.5 miles of Joshua Tree National Park (JTNP) and

approximately 11 miles north of Desert Center. Access to the Project site is via road and railroad. These routes are discussed below in the context of the Eagle Mountain Mine and the Townsite (also see Sections 3.3 and 4.3).

The Eagle Mountain Townsite is located on the alluvial fan on the southern part of the Project site. Elevations range from approximately 1,000 feet on the southeast to approximately 2,800 feet on the northwest. The topography of the Project site is generally disturbed by mining operations and urban development associated with the Townsite. Natural undisturbed mountainous areas exist on the northern and western border of the mine and Townsite. To the south of the Townsite is part of the Chuckwalla Valley floor extending toward Desert Center. Portions of this area are disturbed by unimproved trails, the railroad, and utility lines, as shown in Figures 1-2 and 3.5-3.

3.5.1.2 Eagle Mountain Mine (Proposed Landfill Footprint)

Portions of the Eagle Mountain Mine are proposed for use as a landfill. The Specific Plan for the landfill includes approximately 4,654 acres of land in and around Eagle Mountain Mine. Of this total acreage, the landfill footprint (i.e., the area where waste would be disposed of) would occupy approximately 2,164 acres, and open space and ancillary facilities would occupy approximately 2,490 acres. The landfill footprint consists of substantially disturbed land from the former active operation of the Eagle Mountain Mine, including the East Pit open-pit mine. The proposed landfill footprint also contains intermittent canyon areas that are largely undisturbed. Although active iron ore mining has ceased, Kaiser

maintains a management office at Eagle Mountain and continues to engage in limited mining-related activities, such as the sale of aggregate, iron ore, and riprap. The existing land uses at the portion of the Eagle Mountain Mine proposed for use as the landfill are shown in Figure 3.5-1.

North of the mine are mountainous areas in which little or no mining activity has occurred. These mountainous areas, which are higher in elevation than the lands disturbed from mining operations, provided a buffer for surrounding land uses during full-time mining operations. The elevation of the lowest point in the East Pit is approximately 705 feet above mean sea level. It is located on the eastern edge of Kaiser's mining activity on the Project site. The mining operation extends to the north and west with site disturbance extending to elevations in excess of 2,200 feet.

An area primarily dedicated to equipment maintenance and ore processing during the past period of active mining is located south of the mine and north of the Townsite. This area is shown in Figure 3.5-1. Kaiser has been dismantling and removing the processing equipment and structures from this area since 1983. Although most of the mining equipment has been removed from the property, some mining equipment and some building and transport facility foundations remain onsite. The types of mining equipment and facilities previously at the mine include:

- Tire shop
- Rail lines
- Maintenance facility

- Lube shop
- Equipment washing facilities
- Warehouse building
- Electrical substations
- Ore loading facilities
- Storage areas (for consumables and parts)
- Office buildings
- Parking areas
- Crude ore blending areas
- Concentrate storage areas
- Crushing plants
- Concentrating plants
- Water reservoirs
- Other ancillary facilities

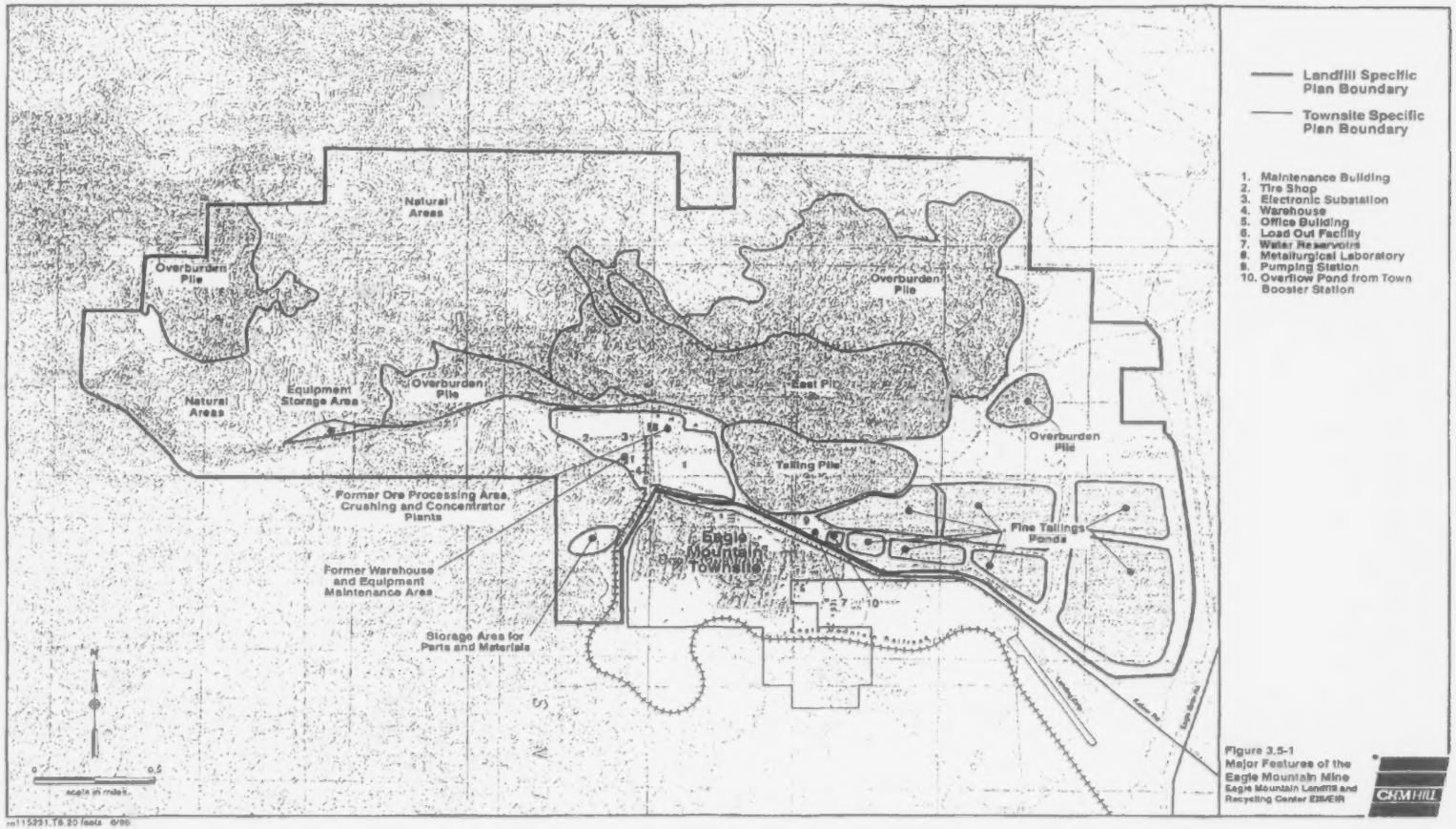

Figure 3.5-1
Major Features of the Eagle Mountain Mine
Eagle Mountain Landfill and Recycling Center EIS/EIR

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3.5-3

Major buildings and facilities that remain intact and operational include the maintenance buildings, the tire shop, the electrical substations, a warehouse, an office building, and a metallurgical laboratory building, two water reservoirs, and a pumping substation. An ore load-out facility is onsite but has been dismantled and is scheduled for removal prior to construction of the intermodal rail yard (i.e., Rail Yard I) in Planning Area 2 of the landfill. The railroad (and associated infrastructure) remains intact.

The area to the southeast of the East Pit is occupied by a coarse tailings pile from mining operations that is approximately 350 feet to 500 feet above the surrounding natural terrain (see Figure 3.5-1). Some coarse tailings also backfill a portion of the East Pit. Terraces of overburden rock and alluvium reaching a height of 600 feet above the adjacent valley floor lie immediately north and east of the pit. To the south and adjacent to the coarse tailings pile (and extending southeast of the East Pit) are dry settling ponds constructed with rock and earthen berms that rise up to 90 feet above the valley floor that (with the exception of the most eastern pond) contain fine tailings.

* * *

7.2.2 General Response 2

Several commenters stated that the Draft EIS/EIR should have evaluated other proposed desert landfill sites as alternatives to the proposed Project. In response to the concern of several commenters that other potential desert landfill sites should have been considered in the alternatives analysis of the Draft EIS/EIR, this response summarizes the EIS/EIR

analysis and conclusion that these other proposed sites are not true alternatives to the Project; rather, these sites should be, and have been, considered on the basis of their potential cumulative impacts with the Project.

The National Environmental Policy Act (NEPA) requires that an EIS contain an analysis of alternatives to the Proposed Action. The BLM's NEPA Handbook requires that an EIS describe the No Action Alternative and all reasonable alternatives, including related monitoring requirements, to the same level of detail as the Proposed Action. The BLM Handbook also requires that an EIS identify alternatives considered but eliminated from detailed analysis.

The California Environmental Quality Act (CEQA) requires that an EIR describe a range of alternatives to the proposed Project, or to its location, that could feasibly obtain the Project's basic objectives. The DR should include alternatives that could feasibly accomplish most of the basic purposes of the Project, and which could avoid or substantially lessen one or more of the significant effects of the Project. CEQA applies a "rule of reason," which requires that an EIR evaluate those alternatives that are necessary to permit a reasoned choice. The EIR must examine, in detail only, those alternatives that the lead agency determines could reasonably and feasibly attain most of the basic objectives of the Project.

The range and type of feasible alternatives that are required to be examined in the EIS/EIR depend primarily on the purpose and the objectives of the proposed Project. If a proposed alternative does not provide a reasonable and feasible option to achieve the Project's basic purposes and objectives, such a

potential alternative can and should be eliminated from detailed consideration in the Draft EIS/EIR. Although a potential alternative cannot automatically be eliminated from detailed consideration because it does not fully achieve every element of the purpose and objectives of the Project, when a potential alternative does not substantially satisfy most of the central objectives of the proposed Project it can and should be eliminated from detailed consideration.

In the case of the Eagle Mountain Project, two of the primary objectives of the Proposed Action are to develop new Class B1 nonhazardous, municipal solid-waste landfill capacity for Southern California and to obtain economic benefits from Kaisers' former Eagle Mountain Mine Site. The EIS/EIR also specifies that the Project serves a number of additional purposes, including meeting the County's financial objectives to develop a long-term source of economic benefit and establishing an Environmental Mitigation Trust for acquisition of habitat for sensitive species.

Applying the principles from NEPA and CEQA, the alternatives considered in the Draft EIS/EIR of the proposed Project were determined to be: (1) No Action; (2) Reduced Volume of Onsite Disposal; (3) Alternate Road Access; (4) Rail Access Only, (5) Landfill on Kaiser Land Only; and (6) Landfill Development/No Townsite Development. Other potential alternatives that were considered but eliminated from detailed consideration were (1) landfill on other Kaiser Properties; (2) waste diversion; (3) offsite landfill locations; (4) landfill mining; (5) alternative townsite locations; and (6) alternative Townsite land use and densities. These potential alternatives were not analyzed in detail because they do not meet the basic objectives of

the Project and/or are not within the jurisdiction of the County of Riverside.

Desert landfill proposals sponsored by others are not true alternatives because they do not meet several of the basic objectives of the Project, including development of an economically beneficial Class In landfill disposal site in the County of Riverside and reclamation of Kaiser's abandoned iron ore mine. Additionally, landfill projects sponsored by others and proposed to be located elsewhere are not "feasible" alternatives within the meaning of CEQA or NEPA. For example, there are no reasonable means by which the Project applicant could obtain another landfill project's entitlement applications and real property interests because these properties are owned and controlled by other applicants.

In addition, the County of Riverside's legal jurisdiction does not extend to other counties; thus an additional factor in the elimination of other desert landfill sites from consideration as alternatives under CEQA because the County has no feasible means to exercise police powers to gain control of property owned and controlled by others outside of its jurisdiction.

Finally, the EIS/EIR discusses the long-term need for waste disposal capacity in the Southern California region, and the need for more than one regional landfill to provide this long-term capacity. Given the capacity shortfall projected for Southern California, more than one regional landfill would be necessary to provide disposal capacity.

Thus, the proposed regional landfills at other desert locations urged by commenters to be studied would, if approved, in some measure help address the Southern California region's long-term waste disposal

needs, but they are not true "alternatives" to the proposed Project. As noted above, the sites are not mutually exclusive, and for this reason the EIS/EIR properly examines these sites in the context of their potential cumulative impacts. Reviewing these other landfill projects as reasonably foreseeable future projects presents a more conservative environmental analysis, because it discloses the aggregate of impacts from regional sites, whereas the alternatives analysis approach would treat the sites singularly and not provide that same type of analysis. This EIS/EIR discloses the full range of anticipated and potential impacts from the Eagle Mountain Project, individually as well as cumulatively, with other landfill projects.

DECLARATION OF TRUST

THE EAGLE MOUNTAIN ENVIRONMENTAL MITIGATION TRUST

THIS TRUST shall be known and identified as THE EAGLE MOUNTAIN ENVIRONMENTAL MITIGATION TRUST ("Trust").

ARTICLE 1

Parties

The Board of Supervisors of the County of Riverside, California (the individual members of which are hereinafter referred to as "Co-Trustees", and the Board itself referred to as "Trustee"), declare that Mine Reclamation Corporation, a California Corporation (hereinafter referred to as "Trustor"), has transferred to the Trustee without consideration the property described in *Schedule A* attached to this instrument.

ARTICLE 2

General Purposes

This Trust is organized for the purpose of:

A. Preserving and enhancing biological, scenic and cultural resources in Riverside County, California, and particularly in the desert regions of eastern Riverside County, by (i) providing for the acquisition, restoration, maintenance and preservation of open space lands, or interests in lands, water or water rights and wildlife habitats thereon, (ii) providing public access facilities to and within such lands, (iii) supporting research and education concerning conservation of such natural resources, and, (iv) monitoring the long-term effects of the Eagle Mountain Landfill Project ("Landfill Project") upon the desert.

B. Providing a mechanism to fulfill (i) a condition of approval imposed by the Board of Supervisors of Riverside County, California, in connection with its approval of the Eagle Mountain Landfill Project, Specific Plan No. 252 to directly mitigate environmental effects of the Landfill Project upon the desert region of eastern Riverside County, and (ii) a mitigation measure imposed by the Bureau of Land Management and required by the United States Fish and Wildlife Service in connection with its consultation with the Bureau of Land Management pursuant to Section 7 of the Endangered Species Act (16 U.S.C. §1531, et seq.) regarding the effects of the Landfill Project upon the Desert tortoise, a Threatened Species, and the Desert pupfish, an Endangered Species. The condition of approval imposed by the Board of Supervisors and the mitigation measure imposed by the Bureau of Land Management require the operator of the Eagle Mountain Landfill Project to pay one dollar ($1.00), adjusted periodically as hereinafter provided, per ton of non-hazardous municipal solid waste deposited at that facility and that the funds thus paid be utilized to fulfill the purposes set forth in Paragraph A of this Article 2.

ARTICLE 3

Trust Estate

A. The Trust Estate shall consist of any and all funds received by the Trustee from any source. All property now or hereafter subject to this Trust shall constitute the Trust Estate and shall be managed and distributed as hereinafter provided.

B. Trustor shall pay to Trustee a ($1.00) dollar per ton tipping fee ("Environmental Mitigation Trust Fee" or "EMT Fee")for all non-hazardous municipal solid

waste deposited at the Eagle Mountain Landfill Project, which fee and the expenditure thereof as required by this Trust was imposed by the Riverside County Board of Supervisors as a mitigation measure and as condition of approval of the operation of such Project and as a mitigation measure required by the Bureau of Land Management, as described in Article 2 hereof.

(1) Commencing on January 1 of the tenth (10th) year after that year in which total municipal solid waste delivered to the landfill reaches the maximum annual amount of non-hazardous municipal solid waste permitted by the County of Riverside ("Base Year") to be delivered to the Project, and on January 1 of every tenth (10th) year thereafter ("Tenth Anniversary Year"), the EMT Fee shall be modified to an amount calculated as follows:

> The then current EMT Fee multiplied by a fraction, the numerator of which is the COLA Index amount on January 1 of the then current Tenth Anniversary Year and the denominator of which is the COLA Index amount on January 1, ten years prior thereto; provide however, that in no event shall the EMT fee be less an one dollar ($1) per ton; and provided further that the increase for the next succeeding ten year period shall not exceed fifty percent (50%) of the EMT Fee in effect immediately prior to the increase as calculated pursuant to this paragraph.

(2) The COLA Index shall be the Consumer Price Index for all Urban Consumers in the Los Angeles-Anaheim-Riverside Areas (1982-1984 = 100), published by the United States Bureau of Labor Statistics. If the COLA Index specified herein is discontinued or revised during the term of the Trust, such other

government index or computation with which it is replaced shall be used in order to obtain substantially the same result as would have been obtained if the COLA Index had not been discontinued.

C. Trustor or Trustee may also apply for and receive public and private grants, and receive gifts, donations and other financial support from public or private sources.

D. Funds from all sources shall be deposited by the Trustee in a Fund to be established and maintained as a segregated account by the Financial Officer of the Trust in accordance with paragraph E of Article 6 below.

ARTICLE 4

Powers of Trustee

In carrying out the general purposes of the Trust as described in Article 2 above, the Trustee shall have the following specific powers in addition to those powers now or hereafter conferred by law under California Probate Code Section 16200, et seq., incorporated herein by this reference, as amended or repealed and reenacted from time to time, and as supplemented or replaced by any successor statutes:

A. To purchase, receive by gift or bequest, sell, transfer, exchange, option, lease or enter into contractual arrangements, such as management agreements, with regard to open space lands and interests in such lands, including conservation easements and water rights, in order to preserve or restore such lands and interests in such lands and other natural and cultural resources of such lands.

B. To purchase, receive by gift or bequest, sell, transfer, exchange, lease, option, construct or repair

improvements, other facilities, personal property and equipment Border to restore, enhance, manage or protect wildlife habitats and other natural and cultural resources and provide public access to open space lands.

C. To conduct and direct studies, plans, research and educational programs regarding the preservation, management and restoration of wildlife habitats, ecosystems, and other natural and cultural resources.

D. To award grants or loans to private nonprofit environmental and land acquisition organizations, and to local, state and federal governmental agencies in furtherance of the powers described in Paragraphs A through C above.

E. To have and exercise all of the following powers in order to fulfill and enhance the specific powers listed in Paragraphs A through D above:

(1) To make and enter into contracts of all kinds, including appraisals, surveys, acquisition, management and operations agreements;

(2) To incur debts, liabilities and obligations, secured and unsecured;

(3) To employ agents, consultants, attorneys and employees;

(4) To be an applicant, make applications for, and receive grants from governmental and private entities;

(5) To initiate or defend, at the expense of the Trust, any litigation relating to the Trust or any property of the Trust Estate that the Trustee considers advisable, and to compromise or otherwise adjust any claims or litigation against or in favor of the Trust.

(6) To have and exercise any and all other powers not specifically mentioned above which may be necessary and proper to carry out the purposes of the Trust.

Notwithstanding any limitation on powers of a trustee or any fiduciary standard, procedure or other requirement imposed on a trustee by the California Probate Code or other applicable law, such limitation, standard, procedure or requirement shall be abrogated or modified to the extent allowable by law in order that the Trustee may, and only to the extent the Trustee is required by this Declaration of Trust to, carry out the purposes of the Trust.

ARTICLE 5

Trust Expenditures and Limitations

The Trustee shall have the power and the obligation to expend, on an annual or more frequent basis any or all of the income or principal of the Trust Estate, up to the whole thereof, as determined in the discretion of the Trustee (with the exception of payments to the National Parks Foundation, as hereinafter provided, for the benefit of Joshua Tree National Park ("Park"), which such payments shall be mandatory), but as otherwise limited or required in this Declaration of Trust. Any income not expended shall be accrued and added to principal.

A. Payments to National Parks Foundation. Ten Percent (10%) of the annual payments to the trust shall be paid by the Trustee to the National Parks Foundations ("Foundation") to be utilized by the Foundation for land acquisition, long-term research, monitoring of the effects of the Landfill Project upon the Park and to increase resource management capabilities of the National Park Service, as the Founda-

tion shall determine to be in the best interests of the Park, in order to mitigate the effects of the Landfill Project on the Park. On an annual basis, and at such time as the Trustee shall determine, the Foundation shall inform the Trustee of the intended use of the payment for the ensuing year and shall provide an accounting of such funds for the previous year, which accounting shall set forth the actual use for which such funds were utilized.

B. Acquisitions. At least eighty percent (80%) of the remaining annual expenditures by the Trustee from the Trust Estate (after payment of the mandatory ten percent (10%) appropriation to the Foundation) shall be used for the acquisition, including the purchase, lease, exchange or other transfer, of interests in real property, water and water rights within those project locations designated in Paragraph D of this Article 5 below. Expenditures pursuant to this paragraph may be made for direct acquisitions by the Trust or in the form of grants to public or private entities which are dedicated, authorized and empowered to conserve, protect, restore and enhance biological, scenic and cultural resources, to acquire specific real property, water or water rights. Applications for grants to acquire interests in real property, water and water rights shall include those protective measures the grant applicant will utilize to assure the long term use and management of the property to be acquired consistent with the purposes of this Trust.

C. Other Expenditures. The remaining twenty (20%) or less of total annual expenditures by the Trustee from the Trust Estate shall be used for all other expenses and costs of and for the Trust, including but not limited to administrative and oper-

ational costs of and for the Trust, or grants and awards to other entities related to the conduct or development of plans, studies, research, property management and education, including, but not limited to, the funding of a monitoring effort by the Bureau of Land Management, the Fish and Wildlife Service, each of which is an Agency of the Department of the Interior of the United States of America and the California Department of Fish and Game ("Long Term Monitoring Team"), to study and monitor the effects of the Landfill Project upon the surrounding desert areas, which monitoring effort shall have the highest priority call upon appropriations from the 15% portion of the expenditures. The Long Term Monitoring Team shall coordinate its efforts with those of the National Park Service funded pursuant to Subsection A hereof, to the maximum extent practicable, in order to avoid duplication of effort.

In addition, a contingency fund shall be established from funds available after the appropriations for the Long Term. Monitoring Team, for the purpose of providing a funding source for the implementation of contingency or response measures identified by the Long Term Monitoring Team or oversight committees to mitigate impacts to affected species which have not been covered under the AB 3180 Monitoring and Reporting Program or permitting conditions. The contingency fund shall be established and maintained as follows: In each of the first four (4) years that the $1.00 per ton tipping fee is paid, $75,000.00 (or such lesser amount that is available after appropriations to the Foundation and for the Long Term Monitoring Team have been made) per year shall be deposited into the contingency fund; in each of the fifth and sixth years, $100,000.00 (or such lesser amount that is available after appropriations to the

Foundation and for the Long Term Monitoring Team have been made) per year shall be deposited into the contingency fund, with the goal of establishing and maintaining a contingency fund totaling $500,000.00. If the funds in the contingency fund do not aggregate $500,000.00 by the end of the sixth year, all monies available each year after appropriations to the Foundation and for the Long Term Monitoring Team have been made shall continue to be deposited until the contingency fund totals $500,000.00. Once the contingency fund reaches $500,000.00, it shall be maintained at such level so that any funds disbursed shall be replenished (after appropriations to the Foundation and for the Long Term. Monitoring Team have been made).

D. Project Locations. Annual acquisition expenditures by the Trustee shall be restricted to or for the benefit of the following specific project locations:

(1) Joshua Tree National Park Inholdings. This area consists of private inholdings located within the Joshua Tree National Park. Notwithstanding the foregoing, the ten percent (10%) mandatory payment to the Foundation, as set forth in Section A of this Article V is intended to be utilized for this purpose, among others, and therefore, only in extraordinary circumstances should additional funds be allocated for such acquisitions from the balance of annual appropriations.

(2) Chuckwalla Bench/Desert Tortoise Habitat Area. This area is generally bounded on the west by the Orocopia Mountains, on the north by Toe of Slope and on the east by the San Bernardino National Forest boundary.

(3) Northwestern Foothills of the San Jacinto Mountains. This area is generally bounded on the west by Highway 79, on the north by Toe of Slope and on the east by the San Bernardino National Forest boundary.

(4) Snow Creek Habitat Area and Wildlife Corridor. This area is generally bounded on the west by the Santa Rosa Mountains National Scenic Area boundary, on the south by the San Bernardino National Forest boundary, on the north by the Whitewater Wilderness Study area, and on the east by the Windy Point area.

(5) Whitewater River and Mission Creek. This area is generally bounded on the west by the San Bernardino National Forest, on the south by Interstate Highway 10, on the north by Big Morongo Creek, and on the east by Highway 62.

(6) Morongo Canyons. This area is generally bounded on the west by Highway 62 and Big Morongo Canyon, on the north by Little Morongo Canyon, on the south by Toe of Slope, and on the east by Joshua Tree National Park.

(7) Santa Rosa Mountains National Scenic Area bounded on the west by the San Bernardino National Forest boundary, on the south by the ridge line, on the north by Toe of Slope, and on the east by the County line.

(8) Indio Hills. This area generally consists of the Coachella Valley, Willow Hold and Edom Hill Preserves and one or more wildlife and sand transport corridors linking the Indio Hills with the Little San Bernardino Mountains.

(9) Mecca Hills. This area is generally bounded on the west and south by the Coachella Canal, on the north by Interstate Highway 10, on the east by Meccacopia Road (between Box Canyon and the Orocopia Mountains).

(10) Orocopia Mountains. This area is generally bounded on the west by Meccacopia Road, on the north by Interstate Highway 10, on the south by the Coachella Canal and Salt Creek, and on the east by the Chuckwalla Bench/Desert Tortoise Habitat Area.

(11) Chucicwalla Mountains. This area is generally bounded on the west by the Chuckwalla Bench/Desert Tortoise Habitat Project Area, on the north by Interstate Highway 10, on the south by the Chocolate Mountains Aerial Gunnery Range, and on the east by the Little Chuckwalla Mountains.

(12) Whitewater River Delta. This area encompasses the mouth of the Whitewater River where it empties into the Salton Sea.

(13) Salt Creek/Dos Palmas Springs. This area is generally bounded on the west by the Salton Sea, on the north by the Coachella Canal, on the south by the limits of the Salt Creek watershed, and on the east by the Chocolate Mountains.

(14) Multiple Species Habitat Conservation Plan. Areas designated for acquisition pursuant to any Multiple Species Habitat Conservation Plan for the Coachella Valley adopted and approved by the Board of Supervisors of Riverside County.

(15) Anza Borrego Desert State Park. This area consists of privately held inholdings within the exterior boundaries of the Park, located within Riverside County.

(16) Wilderness Areas. Areas designated as Wilderness Areas by the Bureau of Land Management, pursuant to the laws of the United States.

(17) Other Acquisitions. Recognizing that the projects listed in items (1) through (16) of this Paragraph D shall have the highest acquisition priority, if the Advisory Committee, as defined in Article 7, advises the Trustee that acquisitions within the projects listed in subparagraphs (1) through (16) have been reasonably met, then funds may be spent in other project areas not specifically listed which are significant for the protection of open space, wildlife habitat, cultural or archaeological resources, or for the implementation of other multiple species habitat conservation plans All expenditures pursuant to the provisions of this subparagraph (17) shall require the consent of four of the five Co-Trustees.

ARTICLE 6

Successor Co-Trustees, Compensation, Expenses and Organization

A. Trustee and Successor Co-Trustees. The Co-Trustees shall consist of those individuals who serve, from time to time, as Members of the Board of Supervisors of Riverside County, California. The term of each such Co-Trustee shall be coterminous with such Co-Trustee's term as Supervisor. No accounting shall be required by any Co-Trustee upon the termination of such Co-Trustee's term.

B. Compensation and Expenses. Co-Trustees shall receive no compensation for their services. However, they shall be entitled to charge the Trust Estate with reasonable expenses. such expenses include the fees and expenses of such agents, employees, advisors and professionals as they may employ during the admin-

istration of the Trust, including but not limited to a Financial Officer, as set forth in Paragraph E of this Article 6.

C. Meetings of Trustee, Chair and Delegation of Power. The Trustee shall meet at such time and place and with such frequency as the Trustee may determine from time to time. A majority of the Co-Trustees shall constitute a quorum at any meeting of the Trustee. The act of the majority of the Co-Trustees shall be considered the act of the Trustee if acting at a meeting at which a quorum is present, except as otherwise provided herein. That Co-Trustee who then serves as Supervisor of the Fourth District, Board of Supervisors of Riverside County, California shall serve as Chair of meetings of the Trustee. A Co-Trustee may from time to time, by a writing delivered to the Chair, delegate to such Chair or to another Co-Trustee any of their powers as Co-Trustee of the Trust. Any such delegation shall terminate upon delivery by the Co-Trustee to the Chair of written notice of termination of delegation. The Chair is authorized to sign all contracts, notes, conveyances and other papers, documents and instruments in writing in the name of the Trust.

D. Third Party Reliance. Third parties dealing with the Trust may rely on Schedule B attached hereto reflecting the current members of the Board of Supervisors. This Schedule shall be updated whenever a change occurs in the composition of membership. The Schedule shall also identify the Chair of the Co-Trustees as the Supervisor of the Fourth District, who shall be authorized to sign all contracts, notes, conveyances, and other papers, documents and instruments in writing on behalf of the Trust. For purposes of conveying, transferring, granting, leasing

or acquiring title to real property, water and water rights, the Trust's interest shall vest as "The Eagle Mountain Environmental Mitigation Trust dated _____"

E. Financial Officer. The Trustee may elect or appoint a Financial Officer who need not be a Co-Trustee, and such other assistants to the Financial Officer as the Trustee deems appropriate. The Financial Officer shall be responsible for the receipt, maintenance and disbursement of all funds of the Trust Estate and for the safekeeping of all properties of the Trait. The Financial Officer shall keep or cause to be kept books and records of account and records of all properties of the Trust. Upon request, the Financial Officer shall prepare or cause to be prepared financial statements or accountings for the Trust upon an annual or more frequent basis. The Financial Officer shall be responsible for the establishment of a Land Conservancy Fund to be maintained as a segregated, interest-bearing account to hold funds of the Trust Estate as identified in Article 3 of this Declaration of Trust in such depositary or depositaries as is designated by the Trustee. Trust Estate funds shall be disbursed upon the check or draft of the Trust signed by those Co-Trustees or other individuals as may be authorized from time to time by the Trustee.

ARTICLE 7

Advisory Committee to Trustee

A. Purpose. The Trustee shall have an Advisory Committee appointed by the Trustee for the purpose of preparing recommendations to the Trustee on the expenditure of funds of the Trust Estate. Within those funding policies and guidelines as shall be

developed from time to time by the Trustee, the Advisory Committee shall develop and implement a grant or award application procedure for purposes of soliciting, evaluating and establishing priorities among land acquisition proposals and other funding and loan requests, and shall then report such recommendations to the Trustee. The Advisory Committee shall also make recommendations regarding annual expenditures and long-term funding priorities from time to time as requested by the Trustee.

B. Composition. The Advisory Committee shall be appointed by the Trustee on an annual basis, and shall consist of the following nine (9) individuals, all of whom shall be residents o Riverside County:

(1) Two (2) members of the Board of Supervisors of Riverside County, California;

(2) Two (2) citizens appointed by the Board of Supervisors of Riverside County, California, one of whom-shall be a Native American;

(3) Two (2) citizens nominated by the Coachella Valley Mountains Conservancy;

(4) One (1) citizen nominated by The Nature Conservancy;

(5) One (1) citizen nominated by The Sierra Club; and,

(6) One (1) citizen nominated by The Desert Protective Council.

In addition, each of the following organizations shall be entitled to appoint one representative who shall attend but have no vote at meetings of the Advisory Committee: the California Department of Fish and Game; the United States Department of the Interior Fish and Wildlife Service; the United States

Department of the Interior Bureau of Land Management; the United States Department of the Interior National Park Service; and the University of California Natural Reserve System. Representatives or citizens to be appointed by entities, including the Trustee, shall be selected by such entities in their discretion. Vacancies on the Advisory Committee shall be filled for the unexpired portion of the term in the same manner as provided in the case of original appointment.

C. Meetings; Quorum. The Advisory Committee shall meet at least annually and more frequently as shall be determined by such Committee within those directives, rules and regulations as the Trustee may adopt from time to time. The Trustee shall also designate the quorum and voting requirements for the Advisory Committee with respect to those matters which come before such Committee.

ARTICLE 8

Revocation and Amendment of Declaration of Trust

This Declaration of Trust may be amended or restated and amended by unanimous vote of the Trustor (which shall include any successor owner and operator of the Landfill Project) and Trustee, at a duly-held meeting of the Trustee or by unanimous written consent of the Trustor and Trustee, provided that no amendment shall authorize the Trustee to conduct the affairs of this Trust in any manner or for any purpose contrary to the provisions of §501(c)(3) of the Internal Revenue Code of 1986 as now in force or amended, nor shall any such amendment or restatement be inconsistent with the primary purposes of the Trust as set forth in Article II hereof. Notice of any revocation, modification or amendment of this

Declaration of Trust shall be provided to the Attorney General, State of California, Charitable Division.

The Trustee are authorized to form and organize a non-profit public benefit corporation under the laws of the State of California, the purpose of which corporation shall be limited to accomplishing those general purposes identified in Article 2 above. Such corporation, when organized, shall have the power to administer and control the affairs and property and to carry out the uses, objects, and purposes of this Trust. Upon the creation of such corporation, the Trustee is authorized and empowered to convey, transfer, and deliver to such corporation all the property and assets to which this Trust may be or become entitled. The charter, articles, bylaws and other organizational documents and provisions for the organization and management of such corporation and its affairs and property shall be consistent with the terms of this Trust.

ARTICLE 9

General Provisions

A. Bonding. All employees or agents handling funds of the Trust Estate shall be bonded as required by law or as required by the Trustee.

B. Tax Year. The tax year of the Trust shall be a calendar year.

C. Tax-Exempt Organization Restrictions. The Trust is organized and operated exclusively for charitable, educational and scientific purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, as subsequently amended (hereinafter the "Code"). Notwithstanding any other provision of this Declaration of Trust, the Trust shall

not conduct or carry on any activities not permitted to be conducted or carried on (i) by any entity exempt from federal income tax under the provisions of the Code or (ii) by an entity contributions to which are deductible under Code Section 170(c)(2). No substantial part of the activities of the Trust shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Trust shall not participate in or intervene in (including the publishing or distribution of statements) any political campaign. on behalf of (or in opposition to) any candidate for public office. The property of the Trust is irrevocably dedicated to the purposes set forth in Article 2 of this Declaration of Trust, and no part of the net income or assets of the Trust shall inure to the benefit of, or be distributable to, any Trustee of the Trust or to any other private individual, except that reasonable compensation may be paid for services rendered to, or reimbursement for expenses incurred for, the Trust, affecting one or more of its purposes. Upon the termination, revocation or winding Up of the Trust, its assets remaining after payment, or provision for payment, of all debts and liabilities of the Trust shall be distributed to one or more exempt organizations of the kind described in the Code, and shall not inure to the benefit of or be distributable to any Trustee of the Trust or other private individual.

C. Annual Accounting or Financial Statements. An accounting or financial statements shall be prepared and provided to the Co-Trustees as soon as reasonably practicable after the close of the Trust's tax year. The financial statements shall contain in appropriate detail the following: the assets and liabilities of the Trust Estate as of the end of the tax year; the principal changes in assets and liabilities of

the Trust Estate during the tax year; the revenue or receipts of the Trust for the tax year; the expenses or disbursements for the Trust for both general and restricted purposes for the tax year. Any accounting or financial statements furnished to the Co-Trustees shall be accompanied by any report of independent accountants, or if there is no such report, the certificate of the Financial Officer of the Trust that such statements were prepared without audit from the books and records of the Trust. Except as otherwise required in this Paragraph C, no accounting shall be required to be made or provided to any beneficiary of the Trust.

D. Trustee Construction of Instrument. The Trustee may construe this instrument, and any action taken relying upon such construction shall be binding on all concerned and shall fully protect the Trustee even though it may subsequently be determined that such construction is erroneous.

E. Fiduciary Liability. Except for any matter involving a Trustee's own individual Willful misconduct or gross negligence, no Trustee hereunder shall incur any liability by reason of any error of judgment, mistake of law, or any action of any kind taken or omitted to be taken hereunder if in good faith reasonably believed by the Trustee to be in accordance with the provisions and intent hereof. No Trustee hereunder shall be liable for any action taken or not taken in reliance on the opinion of any counsel, agent or other representative, provided such counsel, agent or other representative was selected by the Trustee with reasonable care and in good faith.

F. Governing Law. This Trust has been accepted by Trustee in the State of California and, unless otherwise provided in this instrument, its validity,

construction and all the rights under it shall be governed by the laws of that state.

G. Rule Against Perpetuities. This Trust shall terminate and all assets of the Trust Estate shall be distributed in accordance with Paragraph C above no later than twenty-one (21) years after the death of the last member of the group composed of the Co-Trustees and all of their lawful issue alive on the date of execution of this Declaration of Trust.

EXECUTED at Riverside, California, this_____day of_____, 199___.

_____
Co-Trustee

_____
Co-Trustee

_____
Co-Trustee

_____
Co-Trustee

_____
Co-Trustee

WE CERTIFY that we have read the foregoing Declaration of Trust consisting of twelve (12) pages, excluding this page signed by us, and that it correctly states the terms and conditions under which the Trust Estate is to be held, managed and disposed of by the Trustee. We approve the Declaration of Trust

in all particulars, and request the Trustee to execute it.

Dated:_____, 199__, at Riverside, California.

_____

President, Mine Reclamation Corporation, Trustor

_____

Secretary, Mine Reclamation Corporation, Trustor

SCHEDULE A

We certify that the foregoing schedule, designated *Schedule A*, describes property transferred and delivered by us to Trustee this date as property to be administered in accordance with that Declaration of Trust executed by us under date of_____

Dated:_____

_____

Co-Trustee

_____

Co-Trustee

_____

Co-Trustee

_____

Co-Trustee

_____

Co-Trustee

APPENDIX B

JOSHUA TREE NATIONAL PARK GENERAL MANAGEMENT PLAN AMENDMENT

PURPOSE OF AND NEED FOR THE PLAN

BEST AVAILABLE COPY

INTRODUCTION

OVERVIEW

An amendment to the *General Management Plan for Joshua Tree National Park* is needed to guide the management of natural and cultural resources, visitor uses, and NPS administrative practices in the natural zone of what was Joshua Tree National Monument. It would also zone all of the approximately 234,000 acres added to the national park on October 31, 1994.

This draft GMP amendment and environmental impact statement presents a proposed action and three alternatives (including a no-action alternative). After review, comment, and modification, the final version of this draft, when used together with the 1995 *General Management Plan*, will guide management of Joshua Tree National Park for the next 15-20 years. During that time the National Park Service could alter decisions made under this plan only with compliance with the National Environmental Policy Act, public involvement, and other consultation as required by law. Because this amendment primarily addresses wilderness and backcountry management issues, the National Park Service will review the adopted alternatives at five-year intervals.

The proposal and the alternatives in this draft GMP amendment recommend actions that would better protect the park's resources and afford visitors a wide array of recreational opportunities. This document also analyzes the environmental consequences of each alternative.

BRIEF DESCRIPTION OF THE PARK

Joshua Tree National Park is located in the Mojave and Colorado Deserts of southern California. The

park lies along the east-west transverse ranges of the Little San Bernardino Mountains. The south boundary follows the base of these mountains along the northern perimeter of the Coachella Valley; the north boundary is defined by the Morongo Basin. The park lies in San Bernardino and Riverside Counties.

Wilderness

Of the park's more than 794,000 acres, 585,040 acres are legislatively designated as wilderness or potential wilderness and are set aside for the preservation of the most primitive and unconfined forms of recreation. Access is limited to hikers and pack animals and development is generally prohibited.

Features

The compressed transition zone between the Mojave and the Colorado Deserts makes it possible to cross from one desert to the other in less than 65 miles. The park contains all or portions of the San Bernardino, Cottonwood, Hexie, Pinto, Coxcomb and Eagle Mountain ranges. The eastern portion of the park averages 2,000 feet in elevation, while the western half is mostly above 4,000 feet. Extremes in elevation range from 1,000 feet at Pinto Well to 5,900 feet at Quail Mountain. Major valleys include the Pinta Basin, Juniper Flats, Covington Flats, Pleasant, Queen and Lost Horse.

Joshua Tree has unusual desert plants and animals and spectacular geological formations. The name Joshua Tree signifies that the park has a natural history focus, but the area also has a rich and varied cultural history. Humans, from prehistoric times to the present, have lived in this desert environment.

PLANNING DIRECTION

NPS management goals guided the formulation of the proposed action and the alternatives. The management goals are derived from:

- park purpose
- significant resources
- primary interpretive themes

On October 31, 1994, Congress established Joshua Tree National Park and abolished the national monument of the same name that had been proclaimed in 1936. In creating Joshua Tree National Park and other federal reservations in the California desert Congress intended to:

- preserve the unrivaled scenic, geological, and wildlife values associated with these spectacular natural landscapes
- perpetuate the significant and diverse ecosystems of the California desert in their natural state
- protect and preserve historical and cultural values of the California desert associated with ancient Indian cultures and western exploration and settlement
- preserve sites that exemplify the mining. ranching, and railroading history of the old West
- provide opportunities for compatible outdoor recreation, protect and interpret ecological and geological features and historic, paleontological, and archeological sites, maintain wilderness values, and promote public under-

standing and appreciation of the California desert

- retain and enhance opportunities for scientific research in undisturbed ecosystems

The act of August 25, 1916, the organic act of the National Park Service (16 USC 1), prescribed that the "fundamental purpose of . . . parks . . . is to conserve the scenery and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." In 1970 Congress declared that the organic act provisions, including the statement of fundamental purpose, would apply to all areas of the national park system "to the extent that such provisions are not in conflict . . ." with the statute that specifically applies to that particular area (16 USC (c[b]).

The vast majority of the land in Joshua Tree National Park is designated by law as wilderness, either by the act of October 20, 1976 or the act of October 31, 1994. The Wilderness Act of 1964 further describes the purpose of wilderness designations, which is to preserve lands in their natural condition "for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness."

The Wilderness Act defines wilderness as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain, . . . an area of undeveloped Federal land retaining its primeval character and influence without permanent improvements or human habitation, which is protected and managed

so as to preserve its natural conditions . . ." The Wilderness Act also generally prohibits motor vehicles, motorized equipment, mechanized transport, motorboats, permanent roads, temporary roads, landing of aircraft, commercial enterprises, and structures and installations. The act contains some limited exceptions to these prohibitions.

The purpose of Joshua Tree National Park is to preserve the natural and cultural resources of the Mojave and Colorado Deserts so that the resources can be interpreted, understood, and enjoyed by present and future generations.

RESOURCE SIGNIFICANCE

Natural Resources

Joshua Tree National Monument was originally set aside to preserve an ecologically dynamic component of the California Desert—much more than just Joshua trees. The east-west Transverse ranges support examples of Mojave and Colorado Desert ecosystems. The elevations range from almost 6,000 feet to near sea level, which creates an unusual compressed transition zone between the Mojave Desert and the Colorado province of the Sonoran Desert. Early proponents of the monument envisioned a representative segment of the two deserts that would be large enough to embrace a self-sustaining natural system. This system contains biotic and abiotic components that influence each other and are in turn influenced by climate, fire, earthquakes, and other natural phenomena. In 1994 the California Desert Protection Act enlarged the monument to key parts of the Transverse ranges so that the park would have boundaries that were ecological.

The park's central natural resources include the Mojave and Colorado Desert vegetative communities and the wildlife that is dependent on them. Most notable are the Joshua tree forests, the fan palm oases, and riparian communities. Animals such as bighorn sheep, desert tortoise, deer, coyote, bobcat, mountain lion, and a wide range of birds and reptiles are prominent. Water, in the form of springs and seeps and occasional sheet flows conserves the plants and wildlife.

There are exceptional geological features in the park. Mountains and basins dominate the landscape. Unusual and attractive rock formations rise from the desert.

Clean and unpolluted air affords distant vistas, another essential natural resource. Along with air quality, natural quiet and clear night skies are essential for the visitor to realize the beauty and tranquility of the park.

Cultural Resources

The geological and biological diversity of the Joshua Tree area supported early human subsistence. In the post-Pleistocene epoch, the climate was milder and wetter than it is today. The Pinto Basin was a shallow lake 5,000 to 7,000 years ago, narrowing to a river or stream.

Along its banks lived the people of the Pinto Basin complex. Big game hunting was the predominant means of subsistence because the water and lush vegetation lured animals to the area. As the climate changed, the Pinto Basin slowly dried up and populations of animals and people diminished. Human occupancy concentrated outside what is now the park to the palm canyons in the lower valleys and to the

cooler mountains. People returned seasonally to what is now the park area to trade, hunt, and harvest.

The park contains early Pinto culture sites and traces of other prehistoric and historic American Indian cultures as well as remains of Euro-American gold mining, homesteading, and subsistence cattle ranching. The park is archeologically, ethnographically and historically diverse and exhibits a continuum of cultural adaptations. There are significant collections of prehistoric and historic American Indian artifacts and late 19th-century and early 20th-century non-Indian artifacts. These artifacts document the park's importance to east-west migrations from prehistoric times. The remnants of past human occupations illustrate the adaptations that different groups made to the arid desert environment.

Recreational Resources

The natural and cultural resources provide outstanding recreational opportunities for the more than 1 million visitors who come to the park annually. Topographic relief and associated changes in temperatures encourage year-round visitor use. The park provides some of the most diverse desert wildflower displays in the southwestern United States. There is also a wide variety of wildlife to observe; Joshua Tree is a popular location for the sightings of particular bird species not easily found elsewhere. Opportunities to see, photograph, and study cultural resources also draw visitors. Old mines, ranches, and prehistoric rock art are all popular. Massive boulders and rock outcrops provide some of the best rock climbing in the country. Many families like to camp in the park so that they can scramble on the maze of boulders nearby. Skilled and novice technical rock

climbers from around the world are attracted to the challenging climbing routes.

Wilderness Resources

The wilderness resource is a preeminent feature of the park. Approximately 75% of the park has been designated by Congress as wilderness. Wilderness provides an opportunity for recreational experiences that are primitive, nonmechanized, and nonmotorized, such as hiking, horseback riding, and climbing. Such experiences are intended to provide opportunities for solitude. In wilderness, visitors do not remain; they leave the area in an unimpaired state, with little or no trace of their presence.

PRIMARY INTERPRETIVE THEMES

The following interpretive themes are the most important concepts for visitors to understand about the park:

(1) Joshua Tree National Park is comprised of two biologically different environments, the Mojave and the Colorado Deserts, that merge within the park boundaries to create an unusual ecological transition zone. Lush palm oases and springs draw importance to the essential nature of water to a healthy, functioning desert ecosystem.

(2) The Joshua Tree, with its unusual shape and adaptation, is a perfect vehicle for understanding the interdependence of organisms living in the desert.

(3) Plants and animals have evolved to survive in the heat and drought. These adaptations produced an interesting array of life-forms. Humans, from prehistoric times to present, also

adapted to an environment with little water. People who have made this area their home adapted and provided a colorful and varied human history.

(4) The picturesque landscape, including mountain ranges, desert basins, and massive rock outcrops, contributes to the park's significance. The dynamic processes that formed the area, including erosion and earthquakes continue.

(5) Deserts have suffered a great deal of human abuse. The arid landscapes are slow to heal, and tracks made by a single vehicle in the desert soil can often be seen for many years. Fragile desert ecosystems survive in a delicate balance. They quickly manifest even the subtle environmental changes brought about by humans. Protection of the California Desert can only be accomplished from an ecosystemwide perspective that promotes harmonious relationships between people and the environment. The "leave no trace" ethic must be taught to park visitors.

(6) Wilderness is an area of special protection affected primarily by the forces of nature. The imprint of human activities is substantially unnoticeable. People are visitors who do not remain. The park offers the opportunity for visitors to experience nearly 600,000 acres in one of the largest wilderness areas remaining in southern California.

There are a number of natural and cultural history interpretive themes in the broader context of the national park system, including plains, plateaus, mesas, cuestas and hogbacks, mountains, volcanism, sculpture of the land, caves and springs, paleonto-

logical epochs, deserts, streams, cultural development, indigenous people, and European colonial exploration and settlement.

MANAGEMENT GOALS

The *General Management Plan* developed goals to achieve the park's purpose. This amendment retains those goals, which are to:

manage land and wilderness to preserve them unimpaired for future generations

participate cooperatively in the preservation of ecological units that extend beyond the park boundary

improve knowledge of natural and cultural resources

manage visitation more effectively and. reduce impacts associated with dispersed and poorly defined visitor use facilities

educate park visitors regarding the NPS mission and the mutual and cultural resources of the park

facilitate cooperative planning throughout the California Desert ecosystem with other public agencies and communities

improve park circulation; focus on safety. visual quality, and visitor experience

improve the effectiveness of park operations

These eight goals would be achieved in different ways and to varying degrees by the proposed action or the alternatives.

The *General Management Plan* recommended that this *Draft Backcountry and Wilderness Management*

Plan be written to guide management of the natural zone of Joshua Tree National Monument and the 234,000 acres added to the park on October 31, 1994. The *General Management Plan* divided the old monument into management zones: development, natural, and cultural. The natural zone was further subdivided into the natural environment and wilderness subzones. The *General Management Plan* focused almost entirely on the park development zone and deferred to this amendment to address backcountry and wilderness management.

Planning issues for this amendment were identified through public scoping process, in the *General Management Plan* itself, or as a result of other statutory requirements. The major planning issues are:

MANAGEMENT ZONING

The addition of 234,000 acres to the park required that the National Park Service include that land within the framework of management zones that was established for the former monument. Congress has designated certain of the added land as wilderness, which automatically places it in the wilderness subzone of the natural zone. Some of the land is not wilderness but will not be developed. This land would be zoned as the natural environment subzone or as the back-country transition subzone. Some of the added land could be zoned for development to accommodate roads. Congress provided for the protection and conduct of special right-of-way activities by the Metropolitan Water District (MWD) of Southern California on some of the added land, which will be designated as a special use zone.

VISITOR ENJOYMENT

Trails

Inadequate control over the actions of the increased number of visitors has resulted in impacts to resources. The proliferation of trails created not by thought or design but by passage of people or animals has created a network of often redundant social trails that impact vegetation. The social trails concentrate use in only a small part of the park while other areas, suitable for similar experiences, are ignored. They cause compaction of the soils and denude areas of vegetation. Designation of a trail network could minimize such impacts.

Climbing

The use of fixed anchors (such as expansion bolts) far rock climbing has created a need to evaluate whether the permanent installation of such fixtures into rock faces is compatible with wilderness values and the NPS mandate to preserve resources unimpaired. Since February 1993 the park has prohibited new bolts and replacement of existing bolts in wilderness until this plan decides the issue. Managing climbing so that the park provides a wide variety of climbing experiences (from well-aided climbs to clean climbing) is an important consideration. Visitor access to boulders and rock faces has created multiple short trails and damage to resources at the rock bases. The peek seeks the cooperation of the climbing community in marking access points and trails.

Roads

The new land added in 1994 contains over 100 miles of dirt roads or tracks—a few were constructed, but most were created by the passage of vehicles.

This system of roads, cracks, and jeep trails often leads to campsites marked by liner, fire rings, circles of compacted soil, areas denuded of vegetation, and hill-climb areas. Some of the roads, tracks, and jeep trails are in designated wilderness and are automatically closed by law. They are not subject to the decision-making processes of this plan. Other traverse nonwilderness added to the park in 1994. Such roads provide four-wheel-drive access to scenic areas, which could be important to maintain. Holders of valid mining claims or owners of inholdings might have to use dirt roads or tracks that could be closed by the wilderness designation or by actions recommended in this plan. Such use would require NPS authorization.

Automobile Camping

Park regulations require that visitors in automobiles camp only in designated and established campgrounds. This policy should be examined to determine if the automobile camping should be permitted along dirt roads.

Group Sizes, Backcountry Camping, and Area Closures

Group size limits have not been imposed on overnight or day users of the natural zone. A management concern and planning issue involves the possible adoption of group size limits to enhance the visitor experience of the backcountry transition and wilderness subzones.

A related planning issue involves whether to limit backcountry camping to designated and hardened sites or to permit dispersed camping anywhere in the backcountry under some or no specific restrictions. One area (Keys Ranch) has been closed to all visitors

except when accompanied by NPS personnel. This restriction is for the protection of cultural resources. Other areas are limited to day use only for the protection of wildlife, park facilities, and historic sites. Decisions must be made about closures—whether fewer or more areas should be closed issues and and whether such closures should be day use, seasonal, or year-round.

The act of November 10, 1978 (16 USC 1a-7[b]), requires that every *General Management Plan* prepared by the National Park Service include identification of visitor carrying capacities. The National Park Service has concluded at this stage in the planning process that insufficient data exists to establish a carrying capacity for the natural zone of the park and for all land added to the park in 1994.

RESOURCES MANAGEMENT

Artificial Water Sources

Several artificial water sources ("guzzlers"), primarily for bighorn sheep, have been constructed on park land. Two such sources are on former BLM land. There are circumstances under which the artificial manipulation of natural systems could be permissible in the park, including in wilderness. However, such artificial sources may have been installed without attention to NPS management objectives. Some water sources no longer function and have been broken for a long time. Other systems may or may not serve their intended purpose. The question is whether any some, or all of the artificial sources should remain.

Desert Tortoise

On June 28, 1994, the U.S. Fish and Wildlife Service adopted a recovery plan for the Mojave population of the desert tortoise (*Gopherus agassizii*). The recovery plan recommended that federal land managing agencies, primarily the Bureau of Land Management and the National Park Service, designate desert wildlife management areas on the land that the agencies administer. A designated desert wildlife management area is a geographic area of a prescribed minimum size and general location, arrayed in relationship to other such areas, to protect a full complex of desert wildlife, including the desert tortoise.

Although designated desert wildlife management areas are a creation of the *Desert Tortoise Recovery Plan*, their aim is to protect a diverse ecosystem composed of many species at a landscape level. The National Park Service generally refrains from single species management, although species listed under the Endangered Species Act are an exception to this policy. Moreover, designation of a management area is more than single species conservation. It emphasizes protection of sensitive as well as nonsensitive components of communities and protects tortoise habitat as well as habitat for other native species.

The recovery plan recommended the kind of activities that should or should not be permitted in a management area to minimize human impact on the survival of the officially threatened desert tortoise. The recovery plan recommended the designation of a Joshua Tree designated wildlife management area that is largely coterminous with the park. The planning issue involves the extent to which the National

Park Service and this draft GMP amendment will seek to implement the *Desert Tortoise Recovery Plan.*

ADJACENT LAND USE

Developments and other land uses adjacent to the boundary threaten the integrity of the park's resources and wilderness values. Surrounding land use has changed significantly since the 1916 proclamation of the monument. Towns and cities, interstate and state highways, subdivisions, utility corridors, mining, military facilities, and agricultural interests are now on or near the park boundary. The Eagle Mountain landfill has been proposed near the southeast boundary and is the subject of great controversy. Other concerns include the effects of air and water pollutants, invasion of nonnative species from adjacent land, groundwater drawdown, and noisy aircraft overflights that affect wilderness solitude. The park's resources are seriously threatened by illegal activities and uncontrolled access along the boundaries, such as off-road vehicle use, theft of desert vegetation and archeological resources, poaching and reptile collecting, wood cutting, and dumping of hazardous and nonhazardous solid waste.

Joshua Tree has been part of a international biosphere reserve since 1984. Fulfillment of the biosphere reserve concept and long-term protection of ecological units that extend outside of the boundary are made more difficult by land use and development around the park. Congress revised the monument boundaries in 1950 to exclude nearly 250,000 acres to accommodate mineral extraction: The configuration of the 1936 monument that had been designed by biologists to protect the natural systems of two deserts was destroyed in many areas. Congress acted

in 1994 to return substantial portions of the land removed in 1950.

The development of the west Mojave and northern and eastern Colorado coordinated management plans will assist in ensuring protection of ecological units in the California Desert. These interagency plans are led by the Bureau of Land Management with NPS participation. The plans will adopt the management strategies of this draft GMP amendment and will meld those strategies with activities on adjoining land.

RELATIONSHIP TO OTHER PLANS

The final version of this draft GMP amendment will constitute the *Joshua Tree National Park Back-country and Wilderness Management Plan*

Other plans that address park management at a more detailed level already exist, such as the *Fire Management Plan*. Other plans may have to be revised or developed. The *Land Protection Plan* of 1986 was amended in 1996. Both the original *Land Protection Plan* and the 1996 revision concluded that the National Park Service should acquire nearly all 57,000 acres of nonfederal land in the park (the exception would be the congressionally protected MWD land). The *Land Protection Plan* regards all land as essential to protecting the resources of the park and advocates making them available for public enjoyment.

There are 12 patented and 68 unpatented mining claims in the park. The National Park Service is in the process of determining the validity of several of those claims. Anticipated development associated with the claims is minimal. There is no need for Joshua Tree National Park to develop a separate

Minerals Management Plan. Instead, the *Report on Claim Status for Joshua Tree National Park* was prepared. That report, dated March 26, 1997, lists all claims, pinpoints their general location on master title plats. and provides relevant information.

The National Park Service will manage claims in accordance with the regulations at 36 CFR part 9, subpart A and the NPS *Guide to Managing Mining Claims*. All operations in connection with a claim require an NPS-approved plan of operations. Operations include access to a claim other than by foot or pack animal. Prior to approving operations in connection with claims, the National Park Service will first determine if unpatented claim are valid. This requirement does not apply to the 12 patented claims. For any operation that merits NPS approval, the National Park Service would first seek to acquire the claim. Any operator meeting NPS standards must also be in full compliance with laws of the state of California and the counties of Riverside and San Bernardino. Approved operations would be governed under the 9A standards, which require a bond and reclamation. The bond would always be posted with the secretary of the interior or his designee, the superintendent of Joshua Tree National Park.

Abandoned mines are a minerals management issue. The most significant of the mines is a MWD of Southern California gravel pit, approximately 20 acres in size, in the east Coxcomb Mountains Ownership of this land may soon pass to the National Park Service. Many other small scars remain from decades of mining.

The *Resources Management Plan* (RMP) was adopted in 1993. It contains a project statement on the reclamation and restoration of disturbed land

(including closed tracks and dirt roads) that will be updated to include the land that was added to the park in 1994. It will establish a protocol for the systematic monitoring of visitor impacts to the natural and cultural resources of the backcountry transition and wilderness zones and will consider new project statements, including one for the reestablishment of pronghorn antelope to its former range in the park.

The National Park Service will revise the RMP project statement on inventory, documentation, evaluation, and management of cultural resources to include the land added in 1994.

The *Interpretive Prospectus* will not be revised as a result of this draft GMP amendment. However, the National Park Service may have to revise the Compendium of public use restrictions, closures, and conditions as required by regulations at 36 CFR 1.5 upon the adoption of the proposed action or other alternatives in this plan. The environmental impact statement constitutes the environmental review under applicable laws for any revisions to the Compendium.

The decisions made as a result of the final approved version of this draft plan will be incorporated into the ongoing west Mojave and northern and eastern Colorado Desert coordinated management plans. The Bureau of Land Management is the lead federal agency in the development of those plans.

APPENDIX C

PRIVATE LAW 790

* * * *

connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $1,000.

Approved July 3, 1952.

Private Law 789 CHAPTER 573

AN ACT

For the relief of Peter Mihaly Berend.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding those provisions of section 4 of the Displaced Persons Act of 1948, as amended, relating to date of application for an adjustment of immigration status, Peter Mihaly Berend may, at any time within six months following the effective date of this Act, apply to the Attorney General for an adjustment of his immigration status, and notwithstanding those provisions of said section 4 relating to status at the time of entry Peter Mihaly Berend shall, if he is otherwise qualified under the provisions of said section 4, be deemed to be a displaced person within the meaning of said section 4.

Approved July 3, 1952.

Private Law 790 CHAPTER 589

AN ACT

To authorize the granting to Kaiser Steel Corporation of rights-of-way on over, under, through, and across certain public lands, and of patent in fee to certain other public lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized to grant to Kaiser Steel Corporation, a corporation organized and existing under and by virtue of the laws of the State of Nevada, permanent rights-of-way, not exceeding two hundred feet in width, on, over, under, through, and across public lands of the United States in the county of Riverside, State of California, in the townships, ranges, and sections described in section 2 of this Act, for the purposes of construct-operating, and maintaining any and all works, structures, facilities, roads, railroads, power lines, and pipelines necessary, convenient, incidental, or appurtenant to the operation of the mines, camp sites, and mill sites of Kaiser Steel Corporation in the vicinity of Eagle Mountain, Riverside County, in the State of California: *Provided*. That such rights-of-way be subject to existing rights in conflict therewith and shall be subject to reversion to the United States if the rights-of-way are abandoned or not used for a continuous period of seven years by said corporation or its successors in interest: *Provided further*. That the Secretary of the Interior shall attach and impose such further conditions on said rights-of-way, and promulgate such rules and regulations as he shall deem appropriate, consistent with the use of said rights-of-way for the purposes described in this Act.

SEC. 2. Said rights-of-way shall extend through all lands owned by the United States or any department or agency thereof in any of the following townships, ranges, and sections of Riverside County, the State of California:

(a) Township 8 south, range 11 east, sections 20, 29. 28, 27, 21, 22, 23, 14. 13, and 12; township 8 south, range 12 east, sections 7, 8, 9, 10, and 3; township 7 south, range 12 east, sections 34, 35, and 36; township 7 south, range 13 east, sections 31, 32, 29, 28, 21, 22, 23, 14, 13, and 12; township 7 south, range 14 east, sections 7, 8, 5, and 4; township 6 south, range 14 east, sections 33, 28, 21, 16, 9, 8, 7, and 6; township 5 south, range 14 east, sections 31, 32, 29, 28, 27, 26, 23, 24, 13, and 12; township 5 south, range 15 east, sections 7 and 6; township 4 south, range 15 east, sections 31, 30, 19, 20, 17, 18, 7, and 6; and continuing through townships 4 south and 3 south, range 14 east, to a terminal point at the site of the mill and camp of Kaiser Steel Corporation in the vicinity of Eagle Mountain in the State of California.

(b) Township 4 south, range 15 east, sections 30, 19, 20, 17, 18, and 7, and continuing through townships 4 south and 3 south, range 14 east, to a terminal point at the site of the mill and camp of Kaiser Steel Corporation in the vicinity of Eagle Mountain in the State of California.

(c) Township 3 south, range 15 east, section 31, and continuing through townships 4 south and 3 south, range 11 east, to a terminal point at the site of the mill and camp of Kaiser Steel Corporation in the vicinity of Eagle Mountain, in the State of California.

SEC. 3. The Secretary of the Interior be, and he is hereby, further authorized to grant a patent in fee to Kaiser Steel Corporation, a corporation organized and existing under and by virtue of the laws of the State of Nevada, that property located in townships 4 south and 3 south, range 14 east, Riverside County, California, which said Kaiser Steel Corporation now maintains as a camp site and mill site in connection with its mining operations, and which is composed of four hundred sixty-five and eighty-five one-hundredths acres, more or less: *Provided,* That such patent shall be subject to a reservation to the United States of all deposits of minerals together with the right of the United States, its agents, permittees, lessees, or assigns to enter upon, prospect for, mine, and remove such minerals under the laws of the United States and regulations prescribed by the Secretary of the Interior: *Provided further*, That said property shall revert in fee to the United States in the event that said property is not used for a continuous period of seven years as a camp site or mill site or for other incidental purposes in connection with the mining operations of said corporation or its successors in interest.

SEC. 4. The Secretary of the Interior shall fix, and Kaiser Steel Corporation shall pay, a reasonable sum or sums to the United States, including compensation for the cost of surveys necessary to carry out the grants and patent authorized hereby, as consideration for such grants and patent. Said grants and patent shall include suitable detailed descriptions of the property covered thereby.

Approved July 8, 1952.

* * * *

Private Law 790 Chapter 589

AN ACT

To authorize the granting to Kaiser Steel Corporation of rights-of-way on, over, under, through, and across certain public lands, and of patent in fee to certain other public lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, at the Secretary of the interior be, and he is hereby, authorized to grant to raiser Steel Corporation, a corporation organized and existing under and by virtue of the laws of the State of Nevada, permanent rights-of-way, not exceeding two hundred feet in width, on, over, under, through, and cross public lands of the United States in the county of Riverside, State of California, in the townships, ranges, and sections described in section 2 of this Act, for the purposes of constructing, operating, and maintaining any and all works, structures, facilities, roads, railroads, power lines, and pipelines necessary, convenient, incidental, or appurtenant to the operation of the mines, camp sites, and mill sites of Kaiser Steel Corporation in the vicinity of Eagel Mountain, Riverside County, in the State of California: *Provided*, That such rights-of-way be subject to existing rights in conflict therewith and shall be subject to reversion to the United States if the rights-of-way are abandoned or not used for a continuous period of seven years by said corporation or its successors in interest: *Provided further*, That the Secretary of the Interior shall attach and impose such further conditions on said rights-of-way, and promulgate each rules and regulations as he shall deem appropriate, consistent with the use of said rights-of-way for the purposes described in this Act.

SEC. 2. Said rights-of-way shall extend through all lands mud by the United States or any deportment or agency thereof in any of the following ranges, townships, and sections of Riverside County, in the State of California:

(a) Township 8 south, range 11 east, sections 20, 29, 28, 27, 21, 22, 23, 14, 13, and 12; township 8 south, range 12 east, sections 7, 8, 9, 10, and 3; township 7 south, range 12 east, sections 34, 35, and 36; township 7 south, range 13 east, sections 31, 32, 29, 281 21, 22, 23, 14, 13, and 12; township 7 south, range 14 east, sections 7, 8, 5, and 4; township 6 south, range 14 east, sections 33, 28, 21, 16, 9, 8, 7, and 6; township 5 south, range 14 east, sections 31, 32, 29, 28, 27, 26, 23, 24, 13, and 12; township 5 south, range 15 east, sections 7 and 6; township 4 south, range 15 east, sections 31, 30, 19, 20, 17, 18, 7, and 6; and continuing through townships 4 south and 3 south, range 14 east, to a terminal point at the site of the mill and camp of Kaiser Steel Corporation in the vicinity of Eagle Mountain in the State of California.

(b) Township 4 south, range 15 east, sections 30, 19, 20, 17, 18, and 7, and continuing through townships 4 south and 3 south, range 14 east, to a terminal point at the site of the mill and camp of Kaiser Steel Cooperation in the vicinity of Eagle Mountain in the State of California.

(c) Township 3 South, range 15 east, section 31, and continuing through townships 4 south and 3 south, range 14 east, to a terminal point at the site of the mill and camp of Kaiser Steel Carl ration in the vicinity of Eagle Mountain, in the State of California.

SEC. 3. The Secretary of the Interior be, and he is hereby, further authorized to grant a patent in fee to Kaiser Steel Corporation, a corporation organized and existing under and by virtue of the laws of the State of Nevada, that property located in townships 4 south and 3 south, range 14 east, Riverside County, California, which said Kaiser Steel Corporation now maintains as a camp site and mill site in connection with its mining operations and which is composed, of four hundred sixty-five and eighty-five one hundredths acres, more or less: *Provided*, That such patent shall be subject to a reservation to the United States of all deposits of minerals together with the right of the United States, its agents, permittees, lessees, or assigns to enter upon, prospect for, mine, and remove each minerals under the laws of the United States and regulations prescribed by the Secretary of the Interior: *Provided further*, That said property shell revert in fee to the United States in the event that said property is not used for a continuous period of seven years as a camp site or mill site or for other incidental purposes in connection with the mining operations of said corporation or its successors in interest.

SEC. 4. The Secretary of the Interior shall fix, and Kaiser Steel Corporation shall pay, a reasonable sum or sums to the United States, including compensation for the cost of surveys necessary to carry out the grants and patent authorized hereby, as consideration for such grants and patent. Said grants and patent shall include suitable descriptions of the property covered thereby.

Approved July 8, 1952. (H. R. 1853) Kaiser Steel Corporation

RIGHTS-OF-WAY REGULATIONS APPROVED FOR RIGHTS-OF-WAY UNDER PRIVATE LAW 790 (66 Stat. A129) 82d Congress, 2d session—KAISER STEEL CORPORATION

a. Any grant of a right-of-way made under the authority of Private Law 790 (66 Stat. A129) 82d Congress, 2d Session, shall be subject to the terms of the Act and conditions and provisions contained in 43 CFR 244, Subparts A, D, and F (to the extent applicable) including 43 CFR 244.9 (a) to (l) inclusive with the following changes or exceptions therein:

(1) Paragraph 244.9(e) will be amended to read: "To take each soil and resource conservation and protection measures including weed control, on the land covered by the rights-of-way as the superintendent in charge of such lands and reasonably request."

(2) Paragraph 244.9(f) will be amended in this case to read: "To pay to the United States the full value for all damages to the lands or other property of the United States caused by the fault or negligence of the Kaiser Steel Corporation, its employees, contractors or employees of contractors, and to indemnify the United States against any liability for damages to life, person, or property arising from the fault or negligence of the Kaiser Steel Corporation in its occupancy or use of the lands under the right-of-way."

APPENDIX D

DAVID J. YERKE, INC. APPRAISAL
October 5, 1996

David J. Yerke, Inc.
Real Estate Appraisal and Consulting
Bank of America Professional Center
7424 Jackson Drive, Suite Four
San Diego, California 92119-2389
Office (619) 698-3565
Fax (619) 698-2039

October 5, 1996

Bureau of Land Management
California Desert District
6221 Box Springs Boulevard
Riverside, CA 92507

Kaiser Eagle Mountain, Inc.
Mr. Gerry Fawcett
3633 E. Inland Empire Blvd.,
Suite 850
Ontario, California 91764

Re: Eagle Mountain Land Exchange - *Volume I*
Selected Public Lands
Riverside County, California

We have personally examined and appraised the above-referenced property. The following appraisal report is presented in the order as shown by the Table of Contents, which is patterned after the format recommended in the Uniform Appraisal Standards For Federal Land Acquisitions (Washington, D.C., 1992). This appraisal has been performed pursuant to and in accordance with the requirements of 43 C.F.R. Section 2201.3 and the Department of Justice

Uniform Appraisal Standards for Federal Land Acquisitions. The BLM (client) has requested this appraisal in connection with its proposed land exchange with Kaiser Eagle Mountain, Inc.

This firm previously prepared an appraisal report for the selected (BLM) lands; the campsite/millsite lands and the offered (Kaiser) lands on June 5, 1993. The current appraisal report updates the analyses contained in the June 5, 1993 report. As noted later in this report and as reflected in the comparable sales used in our analysis, real property market values in the areas of the subject lands have declined since the previous appraisal was performed in 1993, due to several factors. Therefore, the fair market values of the selected lands, campsite/millsite land and offered lands have also declined since these lands were previously appraised in 1993.

The appraisal assignment concerns lands which are involved in a potential exchange between The Bureau of Land Management (BLM) and Kaiser Eagle Mountain, Inc. in conjunction with the proposed Eagle Mountain Landfill Project. The Eagle Mountain Landfill Project is a proposed Class III, non-hazardous, solid-waste landfill in an unused open-pit mine located at Eagle Mountain in northeastern Riverside County California. Kaiser operated the mine between 1948 and 1983, when mining operations ceased because economic conditions did not warrant further exploration. As part of the cessation of mining activities, the ore concentrating facilities have been removed from the property as has most of the mining machinery.

Under the Federal Land Policy and Management Act (FLPMA), approximately 3,481 acres of public lands managed by BLM are to be transferred to

Kaiser Eagle Mountain, Inc., In exchange for approximately 2,846 acres of land currently owned by Kaiser.

The selected public lands are located within and around the proposed landfill site. The offered private lands are within and adjacent to the Chuckwalla Bench and Dos Palmas/Salt Creek Areas of Critical Environmental Concern, and the Orocopia Mountains Wilderness Area, as designated in the California Desert Conservation Area Plan, as amended and the California Desert Protection Act of 1994. These areas contain identified habitat for the desert tortoise, a Federally listed threatened species, and riparian habitat supporting the desert pupfish, a Federally listed endangered species.

The exchange also includes the reversionary interest of the United States in 460.63 acres of land which was conveyed to Kaiser under Patent 1153422 for campsite and millsite purposes and other uses incidental to mining pursuant to Private Law 790 enacted by the United States Congress on July 8, 1952.

The appraisal assignment concerning the proposed land exchange has been divided into four separate and distinct but interrelated volumes of text. *Volume I* concerns the selected public lands totaling approximately 3,481 acres surrounding the former Eagle Mountain open pit iron ore mine. *Volume II* involves the appraisal of the approximately 460.63-acre "Campsite/Millsite" property, which constitutes a large majority of the former company town of Eagle Mountain. *Volume III* concerns the offered private lands owned in fee by Kaiser Eagle Mountain, Inc., totaling approximately 2,846 acres. These lands consist of seven non-contiguous larger parcels

situated in various locations adjoining along the 52-mile Eagle Mountain Railroad right of way, extending from just north of Interstate 10 to near the Southern Pacific rail junction at Ferrum near the Salton Sea.

Volume IV is devoted to the pertinent comparable land sales utilized within the three appraisal volumes. Detailed data sheets of all of the sales have been grouped into one volume and numbered consecutively in order to avoid any potential overlap and confusion. The consecutive numbering in Volume IV allows effortless referencing of the comparable sales in order to compensate for the relatively random numbering sequence particular to each appraisal volume.

This particular appraisal report is identified as *Volume I*, and concerns the selected public lands totaling 3,481 acres adjacent to and surrounding the former Eagle Mountain open-pit, iron ore, mine and townsite. The Eagle Mountain mine is located approximately 10 miles north of the community of Desert Center and Interstate 10 via Kaiser Road. The lands include steeply sloping mountainous areas to the north and west of the open-mine pits as well as basically level desert lands lying south of the townsite extending easterly to the Colorado River Aqueduct. The desert lands surround two of the old tailing ponds, which, according to United States Geological Survey (USGS) mapping, appear to encroach within the lands being appraised. The level desert lands have access potential from Kaiser Road, a two-lane paved County road which provides the primary access to Eagle Mountain from Interstate 10. The mountainous lands to the north and west of the open-mine pits are within the Eagle Mountains and

include lands which have been actively mined in the past as well as lands identified on topographic maps as mine dumps. Graded dirt roads serving Kaiser's adjoining mining operation, including the mine dumps, cross these lands, providing limited access to the sites.

The selected public lands are zoned M-R-A (Mineral Resources and Related Manufacturing), W-2 (Controlled Development Areas), and N-A (Natural Assets) by the County of Riverside. The selected public lands are within the boundaries of the Chuckwalla Land Use Planning Area of the Riverside County Comprehensive General Plan.

The boundaries of the selected public lands differ from the parcelization shown on County Assessor mapping. Area calculations and exhibits illustrating the locations and acreages of the individual parcels comprising the selected public lands have been prepared by Harold E. Robinson, Professional Land Surveyor of CM Engineering Associates, San Bernardino, California, and are included in the Addenda.

For the purpose of this appraisal, Mr. Robinson's area calculations and exhibits are assumed to be correct and have been relied upon herein. If the area calculations and exhibits are subsequently revised, the appraisers reserve the right to re-analyze and re-evaluate the opinion of Fair Market Value as expressed herein.

Most of the selected public lands are encumbered by lode mining claims and mill sites held by Kaiser Eagle Mountain, Inc. and, according to BLM mining claim records, are reportedly still maintained and valid. These mining claims are expected to be relinquished at the time the land exchange is executed.

For the purpose of this appraisal it is assumed that the mining claims have been relinquished as of the date of value.

A mineral potential report was prepared for the BLM by P.K. Morton, a qualified contractor. The Morton report concluded that the selected public lands were judged to have low potential for mineral resources. Morton also concluded that veins scattered through the property did not contain sufficient materials to be considered valuable. Kaiser also examined the property for gold during the late 1980's and reportedly concluded that there was not sufficient mineralization to warrant economic development. Sand and gravel resources were noted by Morton within the eastern and southeastern portions of the selected public lands. Possible economic sand and gravel resources were found in the alluvial fan deposits. BLM has concluded that the mineral estate is presently without economic value and will also be conveyed as part of the exchange. However, a mineral royalty reservation will be placed on those lands containing sand and gravel resources.

For the purpose of this appraisal, it is assumed that any remaining mineral estate has transferred as part of the fee. No opinion is expressed as to the value of subsurface oil, gas, or mineral rights and it is assumed that the property is not subject to surface entry for the exploration or removal of such materials.

A. Level-I contaminant survey was completed on the selected public lands. Hazardous materials were suspected on the selected public lands, put there by Kaiser during mining operations. Subsequent investigations have determined that there are no hazardous substances occurring on the selected public lands.

Kaiser has agreed to waive any BLM responsibility for any hazardous materials on the selected public lands included in the land exchange.

Per instruction received from the BLM, *"The Appraiser is to be instructed to disregard any effect that the possible presence of contaminant subsistence may have on the value of the land."*

A policy of title insurance for the selected public lands has not been provided. The status of legal access and appurtenant easements to the private roads crossing various portions of the selected public lands is unknown.

The purpose of this appraisal is to estimate the Fair Market Value of the fee simple interest in the selected public lands. Fair Market Value, as defined in the Uniform Appraisal Standards for Federal Land Acquisitions, is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would be sold by a knowledgeable owner willing but not obligated to sell to a knowledgeable purchaser who desired but is not obligated to buy, as of the date of value, The selected date of value is September 25, 1996, which was the latest date of personal inspection.

From the following analysis, it concluded that the estimated Fair Market Value of the selected public lands, as of September 25, 1996, is:

TWO HUNDRED SIXTY-EIGHT
THOUSAND DOLLARS
($266,000)

The opinions of value expressed within this appraisal report do not take into consideration any aspects of the proposed landfill project. The property

has been appraised based on its estimated highest and best use as if available in the open market, in accordance with the underlying zoning regulations, County of Riverside General Plan land use recommendations, and California Desert Conservation Area land use guidelines.

The following pages contain the data upon which the opinions of value are predicated, subject to the enclosed Assumptions and Limiting Conditions and Certification.

Respectfully submitted,

/s/ David J. Yerke

David J. Yerke, MAI
Certified General
Appraiser
State of California
#AG009110
DAVID J. YERKE, INC.

/s/ Frank D. Ohrmund

Frank D. Ohrmund
Certified General
Appraiser
State of California
AG00964B

* * * *

ANALYSIS OF HIGHEST AND BEST USE

Highest and Best Use is defined as:

> "The reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value. The four criteria the highest and best use must meet are legal permissibility, physical possibility, financial feasibility, and maximum profitability."

The Dictionary of Real Estate Appraisal, Second Edition; copyright 1984 and 1989 by the American Institute of Real Estate Appraisers).

This definition applies to vacant land or improved property. The highest and best use of vacant land could be immediate development of the property or holding for future development. As applied to improved property, it considers the possibility that the highest and best use of an improved site could be continued operation of the improvements, conversion to some alternative use, or demolition of the existing structure and construction of new improvements. When a site contains improvements and the highest and best use is determined to be different from the existing use, that use will continue unless and until land value under the highest and best use exceeds the sum of the value of the entire property in its existing use and the cost to remove the improvements.

The highest and best use of a property is determined by social, economic, governmental, and environmental forces. The relative weight that any of these forces carries in determining the highest and

best use of a property depends on the individual property. The four forces work in concert to affect property values, For any given property these forces can exert uneven influence on the value with certain forces having greater impact on that particular property than others.

The process of identifying the highest and best use of a site under both premises involves filtering out the unlikely alternative uses which cannot meet at least one of the four tests of highest and best use. Those tests are: 1) that the use is legally permissible; 2) that the use is physically possible on the site; 3) that the use is financially feasible; and 4) that the use is the maximally profitable use among the alternatives.

The four filtering tests are applied to every conceivable land use until only one emerges as the likely highest and best use. This helps define the criteria for selection of comparable sales to be used in the valuation.

The opinions of value expressed within this appraisal report do not take into consideration any aspects of the proposed landfill project. The property has been appraised based on its estimated highest and best use as if available in the open market, in accordance with the underlying zoning regulations, County of Riverside General Plan land use recommendations, and California Desert Conservation Area Plan land use recommendations. (Assumption No. 19)

Legal Permissibility

The selected public lands are zoned M-R-A, Mineral Resources and Related Manufacturing; W-2, Controlled Development Areas; and N-A, Natural

Assets, all County of Riverside zoning classifications. in general, permitted uses include limited residential uses, light agricultural uses, and mining and mine related activities. Mining operations are permitted in the M-R-A zone but require Conditional Use Permits In the W-2 and N-A zones.

The selected public lands are identified as "Category IV – Outlying Area" in the Riverside County Comprehensive General Plan. "Category IV" land uses contain the least intensive land use of any area in the County and are generally located in outlying areas away from urban centers near large tracts of publicly owned land. The selected public lands are further classified within the Chuckwalla Land Use Planning Area of the Comprehensive General Plan, designated for Open Space and Conservation. The General Plan states that:

> *Open space which will protect County environmental resources and maximize public health and safety in areas where significant environmental hazards exist shall be preserved and maintained . . . Conservation is basically the process of managing all natural resources over a long period of time. It serves to regulate land uses that could lead to degradation of the environment through pollution or loss in productive capacity.*

The selected public lands are designated in two categories on the Open Space and Conservation Map. In general, mountainous portions of the, site are designated as "Mountainous Areas" in the plan and lands on the valley floor are designated as "Desert Areas." Mountainous areas include lands exceeding 25% slope which:

> *. . . because of steep slopes, poor soils, lack of water, lack of access, lack of utilities and their very remoteness are generally not suited for lot sizes less than ten acres. These areas are often heavily brushed and constitute potential fire hazards and are important in relation to water conservation, plant and animal habitat, conservation of mineral resources, recreation, and the conservation of air.*

Permitted land uses in the Mountainous category include open space, limited recreational uses, and limited single family residential development with a minimum lot size of 10 acres. Desert areas are classified as:

> *. . . areas with lack of water and other services and poor access.*

Permitted land uses in the Desert category are similar to the Mountainous category, including open space, limited recreational uses, and limited single-family residential development with a minimum lot size of 10 acres.

In their current, undeveloped state, the selected public lands are in conformance with the underlying zoning classifications and Riverside County Comprehensive General Plan land use regulations. Outside of the proposed landfill project, there is little likelihood that a change in either zoning or land use would be implemented by the County in the near future.

Physically Possible

The selected public lands contain a total of 3,481 acres surrounding the former Eagle Mountain open pit iron ore mine and townsite. The lands include steeply sloping mountainous areas to the north and

west of the open mine pits as well as basically level desert lands lying south of the townsite extending easterly to the Colorado River Aqueduct. The level desert lands have access potential from Kaiser Road, a two-lane, paved County road which provides the primary access to Eagle Mountain from Interstate 10. The mountainous lands to the north and west of the open mine pits are within the Eagle Mountains and include lands which have been actively mined in the past as well as lands identified on topographic maps as mine dumps. Graded dirt roads serving Kaiser's adjoining mining operation, including the mine dumps, cross these lands, providing limited access to the sites.

Public water and sewer facilities are not available in this portion of eastern Riverside County. Non-potable water is provided to the town of Eagle Mountain from wells owned by Kaiser Eagle Mountain, located approximately six miles east of the project site. Reportedly the fluoride content in local water wells does not meet drinking water standards. Bottled water is used by the residents of Eagle Mountain for drinking. There is an existing Kaiser sewage treatment facility, including waste water treatment ponds, located south of town. Electrical power and telephone service is extended to the townsite.

The physical characteristics of the site are judged to be adequate at best for the legally permitted uses.

Financially Feasible

Any proposed use which provides a positive return to the land is considered financially feasible. The question of financial feasibility considers only those potential uses which are legally permissible and physically possible. As stated previously, the under-

lying zoning classifications permit limited residential uses, light agricultural uses, and mining and mine-related activities. Mining operations are permitted in the M-R-A zone but require Conditional Use Permits in the W-2 and N-A zones.

Kaiser operated the Eagle Mountain mine between 1948 and 1983 until mining operations ceased because unfavorable economic conditions thwarted further extraction. As part of the cessation of mining activities, the concentrating facilities have been removed from the property as has most of the mining machinery. Reportedly, there remains substantial deposits of iron ore available for mining. However, the ore is of low-grade quality, which is one of the primary reasons the mine was shut down eleven years ago. There are no plans in the foreseeable future to reactivate the mine for extraction purposes, as evidenced by the dismantling of the machinery and equipment. Since it is not feasible to recover mineral resources at the current time and since future market conditions are not entirely predictable, further mining and extraction is no longer estimated to represent a financially feasible use for the selected public lands.

There is limited agricultural uses in this portion of eastern Riverside County, consisting of a few fields devoted to jojoba and grapes along the Desert Center/Rice Road area, approximately eight miles southeasterly. Primary agricultural areas are over 50 miles distant to the east in the Palo Verde Valley and to the west in the eastern Coachella Valley.

Residential development activity in this subregion has been concentrated around the town of Desert Center adjoining Interstate 10, the Lake Tamarisk development, and within the town of Eagle Moun-

tain. Eagle Mountain was a company town operated by Kaiser Steel which housed mine employees during the 40-odd years in which the mine remained active. At full operation, the town had roughly 4,000 inhabitants and offered all necessary community services and facilities for the populace. Since mining operations ceased in 1983, many former employees have moved from the area. Today, the town is for all intents and purposes shut down and has fallen into a general state of disrepair. Most of the houses have either been razed or boarded up.

The selected public lands are over ten miles distant from Interstate 10 and the town of Desert Center. Although Kaiser has leased some of the campsite/millsite lands for a correctional facility, workers are housed in the remaining homes within the town of Eagle Mountain. Without the mining operation, there is no economic draw to support new residential activity in the area.

Maximum Profitability

Of the financially feasible uses, the use that produces the highest residual land value consistent with the rate of return warranted by the market for that use is the highest and best use. While there may not be one specific use that can be identified, a narrow range of uses can be isolated that will create maximum residual land value.

The selected public lands are situated in a remote, mountainous area of eastern Riverside County adjoining a former mining operation which has now been closed for eleven years and has no potential in the foreseeable future for reopening. None of the legally permissible and physically possible uses are

estimated to be financially feasible on the selected public lands.

The Riverside County General Plan recommends that lands in the subject subregion be preserved for open space and conservation purposes. Lands within this vast expanse of sparsely populated desert are primarily unimproved and have existed in an undisturbed, natural state for over a century. As will be illustrated in the forthcoming valuation analysis, lands in this portion of eastern Riverside County are primarily purchased by speculators and investors who are typically buying lands on speculation that they can be resold at a profit at some point in the future or are land banking for unknown reasons.

There are 16 comparable sales included in *Volume IV* of this assignment for analyses of the various subject properties. All of these comparables involved lands which were in a raw state when sold. These 16 transactions involved raw lands which were purchased for speculation and/or investment purposes rather than for any development potential they might possibly have.

Conclusion

In conclusion, after considering all known facts, it is estimated that the selected public lands do not have imminent development potential. Therefore, the highest and best use of the selected public lands is estimated to be holding for speculative investment and future capital appreciation.

APPENDIX E

FIRST AMENDMENT TO LEASE
July 1, 1990

THIS AMENDMENT is made on July 1, 1990, by and between Kaiser Steel Resources, Inc., Successor to Kaiser Steel Corporation, ("Landlord"), and Management and Training Corporation ("Tenant").

It is expressly covenanted and agreed by and between Landlord and Tenant as follows:

Recital A

This paragraph is amended to increase the size of the Premises as shown on revised Exhibits "A" and "B" (revisions dated October 1, 1989).

Article IV - Rent

4.01 a. - This paragraph is amended to increase the monthly rent to Forty Six Thousand Two Hundred Twenty Dollars ($46,220) commencing July 1 1990 and to Sixty One Thousand Four Hundred and Eighty Two Dollars ($61,482) commencing December 1, 1990.

4.01 b. - This paragraph is amended to allow Tenant a new credit against rent in the amount of One Hundred Ninety Nine Thousand Five Hundred Dollars ($199,500) maximum to help defray Tenant's expenditures, during the first ninety (90) days of this Lease Amendment, to prepare for occupancy the additional houses shown on revised Exhibit "B". This deduction from rent shall be equally divided over the next eighteen (18) months' rent beginning December 1, 1990.

Article XXIV - Notices

24.01 - This article is amended to change the Landlord's address as follows:

Landlord Kaiser Steel Resources, Inc.
8300 Utica Avenue, Suite 301
Rancho Cucamonga, California 91730
Attention: Executive Vice President

All other provisions of the Lease dated November 16, 1987, remain in full force and effect and are unchanged by this Amendment.

IN WITNESS WHEREOF, the parties have executed this FIRST AMENDMENT TO THE LEASE as of the day and year first above written.

MANAGEMENT AND TRAINING CORP.

By: [Illegible]

Title: [Illegible]

KAISER STEEL RESOURCES, INC.

By: [Illegible]

Title: [Illegible]

Supreme Court, U.S.
FILED
MAR 10 2011
OFFICE OF THE CLERK

No. 10-548

IN THE

Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC. AND
MINE RECLAMATION CORPORATION,

Petitioners,

v.

NATIONAL PARKS & CONSERVATION ASSOCIATION ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Exercising the authority delegated to it by Congress, the Department of Interior oversaw a decade of expert study and approved a land exchange with Kaiser. After a further ten years of litigation, the Ninth Circuit sustained Interior's finding that the exchange should be approved under the governing statute because it will further the public interest, including by protecting vital "threatened and endangered species." Pet. App. 22 (citing finding at Pet. App. 174-75).

The petition for certiorari demonstrated that the majority's determination to nonetheless vacate the agency's approval of the exchange and remand with orders to start all over contravenes "Congress' admonition that in reviewing agency action, 'due account shall be taken of the rule of prejudicial error.'" *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) (quoting 5 U.S.C. § 706). The opinion below, which does not contain one sentence explaining why the Secretary's approval of the land exchange might be affected by the minor errors that Judge Pregerson's majority opinion purported to find, is nothing more than "a clear exercise in blind form over substance." Pet. App. 96 (Trott, J., dissenting).[1]

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[1] Kaiser argued on appeal that any error by BLM was harmless, because "[t]he district court could not order the [agency] to conduct studies already completed to answer questions the [agency] has already answered." C.A. Br. 42 (citation omitted). Kaiser explained that "if extra-record evidence shows that an agency has rectified a NEPA violation

Because the importance of the ruling below is undeniable, and because there is no merit to respondents' attempt to reconcile the Ninth Circuit's decision with this Court's precedents and with the decisions of other circuits, certiorari should be granted.

1. Preliminarily, respondents make no effort to dispute the profound importance of the ruling below. This is not mere error correction. The Ninth Circuit's decision devastates a project that is "the *cornerstone* of a long-term plan to provide vital solid waste disposal capacity to Southern California for the next 100 years," L.A. Sanitation Br. 2 (emphasis added), and that an expert study panel found would be a "model" for projects the world over, Pet. App. 42.

Respondents seek further administrative proceedings in no small part in the hope of killing the project through endless process. Once the agency on remand prepares yet another EIS and appraisal, they want to "administratively appeal or judicially challenge [that] decision" too. NPCA Br. 23. Respondents view the ten years and $80 million the federal government and the project's private sponsors have invested, followed by another decade litigating

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after the onset of legal proceedings, that evidence is relevant to the question of whether relief should be granted." C.A. Reply Br. 30. It further maintained that the court of appeals could not properly require the agency "to prepare studies that [it] already has completed and that cannot be successfully challenged." *Id.* (citation omitted). *See also infra* (demonstrating that harmlessness of each of three supposed errors was both pressed by petitioners and passed upon by the court).

its approval, as "[r]ushing to judgment here." Charpieds Br. 36. For this Court to permit such a ruling to stand will send a stark, negative signal to other parties who would pursue major projects requiring governmental approval that are necessary to fulfill critical public needs.

"[U]nnecessarily sending [Kaiser] back to a Sisyphean hill which cannot be climbed in a lifetime," Pet. App. 43 (Trott, J., dissenting), is not a viable option. Because the region's solid-waste disposal plan requires a difficult and lengthy "transition from local urban landfills to a system of disposal that relies on remotely-located landfills accessed by rail," L.A. Sanitation Br. 4, "progress must occur *now* to secure the additional solid waste capacity needed for Los Angeles County," *id.* 6 (emphasis added). On an even more personal level, the elderly retirees whose medical care turns on the revenue generated from this environmentally and socially beneficial project "cannot wait another ten or twenty years for their benefits." VEBA Br. 3.

The recurring importance of the ruling below for still other important projects has now been confirmed. Just as *amicus* CVEP anticipated, Br. 6-7, the same attorney who represents the Charpieds respondents has sued to block a major solar initiative on the ground that it is invalid under the ruling below. *Western Watersheds Projects v. Salazar*, C.D. Cal. (complaint filed Jan. 12, 2011); *Desert Solar Projects Now Threatened By Eagle Mountain 9th Circuit Court Decision*, THE PUBLIC RECORD, at 1 (Jan. 2011).

The position of the Solicitor General – "that the court of appeals erred in remanding the case," but

that the ruling below is ultimately fact-bound, U.S. Br. 9 – is incorrect, although that is an unsurprising posture for the government to adopt. The United States cannot explicitly admit that the decision below stands as a significant obstacle to federal approvals for this and other critical projects, because – if certiorari were denied – that admission could later be quoted back against it in court. Further, because the Kaiser landfill is a state and local initiative, the Executive Branch has no overriding imperative to secure further review. The relevant point, however, is that on the merits the United States unambiguously maintains that the ruling below is erroneous.

2. The Ninth Circuit erred in invalidating the land exchange on the ground that the Yerke Appraisal fails to assess whether landfill use is the property's "highest and best use" under *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1180 (9th Cir. 2000). *See* Petrs. C.A. Br. 42 and C.A. Reply Br. 30-32 (arguing that Herzog Report made it unnecessary and improper to vacate the land exchange).

a. Preliminarily, respondents mischaracterize the case's procedural history. The Herzog Report is not part of a "new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Rather, BLM formally adopted the Herzog Report and reaffirmed the land exchange in agency action that became final when respondents did not appeal.

In 1997, when the BLM District Manager issued the initial Record of Decision (ROD) approving the Kaiser land exchange, Pet. App. E, respondents

administratively appealed and lost, Pet. App. C. After respondents filed this suit, the Ninth Circuit decided *Desert Citizens*, and respondents then raised a "highest and best use" argument for the first time. BLM responded in the only way possible: it promptly commissioned Herzog to conduct a new analysis that conformed to *Desert Citizens*. *See* Pet. App. 302-03. Of particular note, Herzog prepared BLM's response in *Desert Citizens* itself, in which the district court "found that Mr. Herzog's appraisal report cured any defects found in the original appraisal by the Ninth Circuit." Pet. App. 308.

BLM appraisals and any appeals by objectors are governed by "Section 2200.0-6 of the exchange regulations (43 CFR Part 2200)." Pet. App. 222. *See also* Pet. App. 165, 173-74. In this case, Herzog conducted a detailed analysis which concluded that landfill use was not the property's highest and best use. *See* Pet. App. 313-28. *Contra* Charpieds Br. 23. BLM's Chief State Appraiser then approved Herzog's conclusions in a lengthy report. Pet. App. J; *see* 43 C.F.R. §§ 2201.3, 2201.3-4 (requiring appraisal and appraisal review).

On that basis, the District Manager – the same official who issued the first ROD – formally determined that the original ROD's determination "that the exchange was in the public interest was well supported by the information at the time and *remains valid.*" Pet. App. 304 (emphasis added); *see also* 43 C.F.R. § 2201.7-1(a) (after appraisal, "the authorized officer shall decide whether to approve" a land exchange).

BLM then formally certified the Herzog Report, the Chief Appraiser's report, and the District

Manager's decision as part of the administrative record. Pet. App. H; *see also* U.S. Br. 6 ("BLM approved the Herzog report, formally added it as a supplement to the administrative record, and submitted it to the district court as an attachment to BLM's joint summary judgment motion with Kaiser.").

The District Manager's decision was unquestionably appealable agency action under 43 C.F.R. § 4.410(a). Respondents' contrary argument rests on the false claim – which not even the Ninth Circuit adopted – that BLM's regulations first require "public review and comment" on an appraisal and its approval. Charpieds Br. 22. The appeal regulation provided at the time (with irrelevant changes made last year) that "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management . . . shall have a right to appeal to the Board . . . ." 43 C.F.R. § 4.410(a) (amended Nov. 18, 2010). Respondents' right (and concomitant obligation) to appeal is not actually disputable: respondents initiated this very litigation after appealing an *indistinguishable* decision – the original ROD – by the *same* BLM official. *See* Pet. App. 96 (Trott, J., dissenting).

b. Respondents equally misstate the legal basis for the Ninth Circuit's holding that it would not consider the Herzog Report as a matter of law. Judge Pregerson's opinion rested on the Ninth Circuit's settled refusal to consider "supplemental materials presented after the onset of litigation" in cases that involve challenges "to a final agency action," finding it decisive that the Herzog Report "was not before either the BLM or the Appeals board" when BLM

originally issued its 1997 ROD. Pet. App. 19 n.5. Furthermore, the Ninth Circuit refuses to consider a subsequent agency decision unless it is itself final agency action that is "*immune* to challenge." *Id.* (emphasis added).

On either of two related grounds, the Ninth Circuit's decision cannot be reconciled with decisions of this Court and circuits applying ordinary harmless error principles. *See* Pet. 25-26. First, any initial error of BLM in failing in the Yerke Appraisal to explicitly address landfill use as the property's highest and best use is harmless because BLM subsequently formally adopted the Herzog Report and respondents did not appeal. Second, even if respondents were correct that the Herzog Report is not part of the agency record on this appeal, the remand ordered by the Ninth Circuit is pointless, because the Herzog Report is not only binding as final agency action but it in any event makes clear that BLM on remand will reaffirm its initial highest and best use determination. *Cf. National Ass'n of Home Builders*, 551 U.S. at 660 n.5 (remand improper when agency specified its position "[f]ollowing the issuance of the panel's opinion").

Nor is there merit to respondents' remaining argument that *Desert Citizens* affirmatively precludes Herzog's detailed finding that landfill use is not the government property's highest and best use. The majority did *not* dispute Kaiser's showing that Herzog "did consider highest and best use, as required by our decision in *Desert Citizens*." Pet. App. 19 n.5. "[T]he court of appeals in this case did not identify anything in the administrative record underlying the agency decision under review that

indicated a likelihood that BLM would have reached the same conclusion" only *because* "the court of appeals refused to consider [the Herzog] report." U.S. Br. 10. *See also* L.A. Sanitation Br. 5 n.2 (explaining that respondents' reliance on the purchase price for the fully permitted project to suggest that BLM undervalued the government's property is grossly misleading).

The Ninth Circuit accordingly should have held that BLM's reaffirmation of the land exchange in light of the Herzog Report was binding as final agency action, or at least should have assessed respondents' highest and best use claim in light of the Herzog Report. There is no basis in law for the Ninth Circuit to vacate the land exchange and "send the case back to [BLM] to do something BLM has already adequately done." Pet. App. 36 (Trott, J., dissenting).

3. The petition established that this Court should review the Ninth Circuit's holding that a flaw in a single paragraph of BLM's 1600-page EIS required it to vacate the land exchange. Kaiser argued below that any error by BLM in formulating this one paragraph did not warrant reversal, because it is obvious from the entire record that BLM in fact "considered a wide range of alternatives," C.A. Reply Br. 35, including "evaluated waste diversion, offsite landfill locations, a landfill on other Kaiser property, and the 'landfill on Kaiser land only' alternative," C.A. Reply Br. 37. "BLM did evaluate and consider alternatives that would not use federal land for the project." C.A. Br. 46.

Respondents now echo the leap in logic of the majority below from the premise that BLM

acknowledged Kaiser's goals in one paragraph to the unsupportable conclusion that BLM must have refused on that basis to consider alternatives that would not have furthered Kaiser's goals. That makes no sense and is contrary to the record. BLM was required by law to acknowledge Kaiser's purposes; it literally had no choice. *See* Pet. 27; Pet. App. 47 (Trott, J., dissenting) (citing cases). Respondents thus fail to answer the petition's showing that the ruling below puts agencies in the impossible position of having to acknowledge the purposes of proposals of private industry, without thereby being found *ipso facto* to have capitulated to private interests. *See generally* PLF Br.

Like the majority below, respondents inexplicably treat as irrelevant BLM's detailed explanation for why it declined to pursue alternatives that would not involve some form of the land exchange. Respondents hypothesize that there might be alternatives that "benefit the public interest *more* than the proposed project," Charpieds Br. 32 – for example, because it might be true "that the public interest is better served by a different use of the targeted [governmental] lands or that Los Angeles County's interest in additional desert landfill space beyond the new Mesquite Regional Landfill can be met on other, less sensitive land," NPCA Br. 18. But BLM explained at length and in cogent detail that the alternatives to the project would fail to produce "federal acquisition and consolidation [of] environmentally sensitive lands" – *i.e.*, the Kaiser property. Pet. App. 231. The alternatives would also create greater danger for the Park, Pet. App. 230; increase air pollution, *id.*; be economically infeasible,

id.; depend on "highly volatile" alternative markets, Pet. App. 231; and create "health concerns," Pet. App. 233. To the extent that other landfills were viable, those alternatives were "not mutually exclusive" with the Kaiser project and could be pursued separately. Pet. App. 232. Respondents' further complaint that BLM also cited a goal of "*reclamation* of the Kaiser mine site,'" Charpieds Br. 36 (quoting Pet. App. 231-32), makes no sense: reclamation is obviously an important environmental goal. What respondents omit is – as Judge Trott explained – that "Kaiser's obvious *pecuniary* goals are nowhere in sight." Pet. App. 46 (emphasis added). In fact, not even the majority doubted that the entirety of the record demonstrated that the public interest drove BLM's choice of the alternatives to study – it simply refused to look beyond a single, isolated, summary paragraph.

Critically, the environmental benefits of the project are no longer disputed. Respondents thus fail to come to grips with the implications of the Ninth Circuit's explicit approval of BLM's determination that the land exchange would further the public interest. BLM specifically found after detailed study – and the majority below *accepted* – that the government would secure significant environmental benefits by acquiring Kaiser's land. The project significantly furthers environmental protection because the parcels contributed by Kaiser encompass "environmentally sensitive lands, including an area designated by the United States Fish and Wildlife Service as critical habitat for the threatened desert tortoise." U.S. Br. 4. Further, the project would "generate[] $1 per ton of waste deposited at the

landfill in support of mitigation and monitoring efforts" for "protection of more than 745,900 acres of habitat across 21 conservation areas." CVEP Br. 4.

4. Finally, the petition, at 31-32, demonstrated that the Ninth Circuit committed the same legal error in vacating the land exchange on the basis of the EIS's discussion of eutrophication. *See* Pet. App. 32. The court of appeals did not accept the district court's conclusion that the EIS's analysis of that one issue was insufficiently developed. Rather, the majority below concluded that, although the EIS did substantively address the issue of eutrophication, it was nonetheless flawed because it failed to present that analysis "up front" in a single section. Pet. App. 32. Judge Pregerson concluded that the EIS thereby violated the Ninth Circuit's rule that an EIS will be assessed not merely for its substance but also on the basis of its "form." *Id.* (Respondents thus err in attempting to suggest that the issue is not preserved for review in this Court: the Ninth Circuit itself articulated this distinct basis for invalidating the EIS and "passed upon" whether the EIS's form rendered it invalid. *Id.*)

Respondent NPCA notably does not even attempt to defend the court of appeals' holding or to deny that it conflicts with other circuits' rulings that supposed errors in the form of EISs are *not* a basis for invalidating the underlying agency action, unless it can be shown that the errors harmed the public's ability to contribute to the agency's analysis. *See* Pet. 21-24 (collecting cases). The Ninth Circuit's exclusive reliance on the "form" of an EIS stands in stark and troubling contrast to the focus of other courts of appeals on the effect of any error on the substance of

the agency's analysis. In this case, BLM's discussion of eutrophication in the EIS was extensive, and the public had the opportunity to comment not only in writing but in multiple open hearings. Judge Pregerson's opinion made no contrary claim. Vacating BLM's approval of the land exchange to require BLM to reorganize the EIS – leading only to another round of appeals – conflicts with basic principles of administrative law.

In sum, this Court should review the Ninth Circuit's determination to vacate and remand BLM's approval of the land exchange underlying project – which is absolutely critical to regional planning in Southern California – on the basis of three errors that will have no effect on the agency's decision making.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC., *et al*
Petitioners,

v.

NATIONAL PARKS & CONSERVATION ASSOCIATION, *et al*.
Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF COACHELLA VALLEY ECONOMIC PARTNERSHIP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

The Coachella Valley Economic Partnership ("CVEP") moves this Court for leave to file an amicus curiae brief in support of Petitioners, Kaiser Eagle Mountain, Inc. and Mine Reclamation Corporation (collectively "Kaiser"). This Motion and the proposed Amicus Brief below are filed within 30 days of the time this case was placed on the Court's docket. Counsel of record for each party was given notice of CVEP's intent to file an amicus brief at least 10 days prior to the date on which this Amicus Brief was filed. Petitioner has consented to the filing of this Brief, and a letter of consent has been filed with the Clerk of this Court. The Solicitor General's Office, on behalf of the Bureau of Land Management and United States Department of Interior has also consented to the filing of this Brief. Written consent has been filed with the Clerk of this Court. Counsel for the National Parks & Conservation Association has also consented, and written consent has been filed with the Clerk of this Court. Counsel for Donna Charpied, Laurence Charpied, and the Desert Protection Society and Center for Community Action and Environmental Justice did not respond to CVEP's request for consent.

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INTEREST OF AMICUS CURIAE

CVEP[1] is a regional economic development organization devoted to improving both the economy and quality of life in the Coachella Valley. The Coachella Valley is located in southeastern Riverside County, California, and is bounded by the San Jacinto, Santa Rosa, and Little San Bernardino Mountains. The area, west of the Kaiser project site, is known for its natural beauty, and as one of the world's top resort communities.

CVEP is comprised of both private and government partners dedicated to studying and implementing local strategic initiatives that spur sustainable economic growth. CVEP's government partners come from each of the nine incorporated cities comprising the Coachella Valley: Palm Springs; Desert Hot Springs; Rancho Mirage; Cathedral City; Indio; La Quinta; Palm Desert; Indian Wells; and Coachella. CVEP has numerous other government partners, including but not limited to, the Agua Caliente Band of Cahuilla Indians, the Cabazon Band of Mission Indians, the Torres Martinez Desert Cahuilla Indians, the County of Riverside, the Riverside County Economic Development Agency, the Coachella Valley Association of Governments, and the Palm Springs Desert Resort Communities Convention and Visitors Authority, Imperial Irrigation District, Coachella Valley Water District, and Sunline Transit Agency. CVEP's private partners come from a cross-section of regional

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[1] No counsel for a party authored the proposed Amicus Brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief.

industries, including representatives from Desert Regional Medical Center, Southern California Edison, Rabobank, the Desert Sun newspaper, Pacific Western Bank, and many other organizations.[2]

The Kaiser Petition addresses generally the amount and type of judicial scrutiny appropriate for an administrative decision, but the particular issues raised by the underlying case have a far-reaching impact on our regional community and on the potential for its current and future development. Federal lands comprise the bulk of the magnificent desert areas of eastern Riverside County, but local involvement with conservation efforts and responsible development is a key factor in preserving both the character and long-term integrity of living systems and dramatic landscapes in the region. This case is important to our region and partners.

ARGUMENT

I. The Decision Below Allows The Ninth Circuit To Substitute Its Own Judgment For Agency Review Informed By Local Concerns

In its published decision below, the Ninth Circuit found fault with the Statement of Purpose and Need adopted by the Bureau of Land Management ("BLM") supporting the proposed land exchange between Kaiser and the United States. 606 F.3d 1058, 1070-71. Specifically, the court found the

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[2] The above-named are CVEP partners and their inclusion in this Amicus Brief should not imply their independent support of its contents.

BLM too narrowly defined its Statement of Purpose and Need, taking into account Kaiser's needs more than those of the BLM. *Id.*

But, the opinion below focuses too narrowly on the summary paragraph in the Statement of Purpose and Need, essentially deeming irrelevant the significant environmental benefits accounted for by the BLM in its extensive environmental analysis of the project. *See* 606 F.3d 1058, 1078-79, 1083, 1089-91. Among other things, the land exchange would have allowed the BLM to acquire from Kaiser important habitat areas already recommended for acquisition under the California Desert Conservation Area ("CDCA") Plan. *Id.* at 1082. That is, the land exchange would have permitted conservation of important habitat for several endangered species, and would have allowed that habitat to become part of very large area of desert land already protected from development.

Further, the Kaiser project was originally intended to provide a major source of funding for the Coachella Valley Multiple Species Habitat Conservation Plan ("MSHCP"). The MSCHP was the result of a decade-long joint planning process among local, state, and federal agencies responsible for regulating development and protecting habitat in the Coachella Valley. The plan is administered by the Coachella Valley Conservation Commission ("CVCC"), a joint powers authority comprised of elected officials and dedicated to the purchase and management of conservation land in the Coachella Valley. *See* Coachella Valley MSCHP Home Page, http://www/cvmshcp.org (last visited Nov. 16, 2010). Most of CVEP's government partners are involved

with the CVCC. The purpose of the MSCHP is to facilitate management and monitoring of conserved lands, simplify compliance with environmental laws, and balance environmental concerns with responsible new development. The MSCHP identified for protection more than 745,900 acres of habitat across 21 conservation areas. It identified 27 separate species of plants and wildlife for which to provide protected habitat in the near future and in perpetuity. On the identified lands, development is strictly limited to not more than 22,420 acres. The project involves acquisition of identified lands, mitigation of development impacts, and monitoring of biological characteristics and particular needs of the species and lands being preserved.

Funding for the MSCHP comes from a combination of sources, including developmental impact fees, open space trust funds, and permitting fees. As the record below reflects, and as noted in the dissent (*id.* at 1081), the Kaiser project would have generated $1 per ton of waste deposited at the landfill in support of mitigation and monitoring efforts under the MSCHP. Revenues generated by the Kaiser project would also have been used to acquire additional lands for conservation.

In "flyspecking" the BLM's decision to exchange government land, the Ninth Circuit focused on particular language in the Environmental Impact Statement prepared by the BLM rather than on the whole record, which described the overall environmental benefits the project would have provided to Riverside County and the Coachella Valley region. Those benefits were clear to the BLM, as articulated in the lengthy Record of Decision, and

the Ninth Circuit should not have blithely substituted its own judgment in place of the BLM's extensive administrative process, which took into account local needs and concerns.

II. The Decision Below Will Hinder Future Development Efforts And Encourage Obstructionist Litigation

Because the Ninth Circuit discounted the BLM's extensive administrative process in this case in favor of its own interpretation of narrow portions of the Record of Decision, its published opinion effectively declares open season on developers, even those working within the confines of the strict environmental laws in California.

Kaiser first proposed the land exchange with the BLM in 1989. It began working with the BLM and Riverside County in the early 1990s to conduct extensive environmental review as required by the California Environmental Quality Act ("CEQA") and other applicable laws. This case was tied up in litigation at the state level for many years (*see Nat'l Parks & Conservation Ass'n v. County of Riverside*, 50 Cal. Rptr. 2d 339 (Cal. Ct. App. 1996), *Nat'l Parks & Conservation Ass'n v. County of Riverside*, 84 Cal. Rptr. 2d 563 (Cal. Ct. App. 1999)) and has been tied up in the federal courts for many more. Indeed the federal lawsuit, filed by the same plaintiffs who lost in state court, was filed in 1999, more than 10 years ago.

The Ninth Circuit's decision ignored the long history of the Kaiser project, and nearly 50,000 pages of record supporting the BLM's ultimate decision, in

favor of unsubstantiated claims by obstructionist plaintiffs. Local land use authorities take very seriously their statutory responsibility to work with federal and state agencies to carefully balance conservation and development goals. The seriousness of that effort is attested to by the lengthy administrative record in this case. CVEP is concerned the decision below will diminish the importance of local input and transfer to the courts the decision-making authority entrusted to local, state, and federal agencies entrusted with protecting our region's natural endowment.

CVEP is also concerned the decision below will discourage development of any kind, even environmentally responsible development essential to regional economic vitality. If the Kaiser project, which would have positively impacted the Coachella Valley region and its conservation efforts, was "flyspecked" to death how can one expect any future project will fare better? Even the most environmentally conscious developers will not be able to accomplish what Judge Trott, in his dissent, described as a "Sisyphean task"—eliminating, to the satisfaction of a reviewing court, every technical error, even those that have no effect on the reviewing agency's substantive decision.

In its published decision the Ninth Circuit has set a precedent that enables obstructionist litigants to halt development by alleging insignificant errors resulting from "flyspecking" an agency's analysis. There are several current projects in the vicinity of the Kaiser project that could be derailed by that kind of "flyspecking."

Specifically, the projects in question are large-scale solar projects, many of which are cited on BLM land in eastern Riverside County, and almost all of which would be open to the same kinds of challenges raised in this case. CVEP's 2009 Blueprint for Economic Development (*see* CVEP Blueprint Home Page, http://www.cvepblueprint.com/ (last visited Nov. 16, 2010)) targets clean technology and energy-generation as a priority for local investment. Clean technology has become a significant factor in the regional economy, with a series of large-scale solar projects being proposed in Riverside County. Projects in eastern Riverside County have already been approved by the California Energy Commission, working together with the BLM: Solar Millennium Blythe, with nominal generation capacity of 1,000-megawatts (Cal. Energy Comm'n, Solar Millennium Blythe Solar Power Project, http://www.energy.ca.gov/sitingcases/solar_millennium_ blythe/index.html (last visited Nov. 16, 2010)), and Genesis Solar, a 250-megawatt generation facility, also near Blythe (Cal. Energy Comm'n, Genesis Solar Project, http://www.energy.ca.gov/sitingcases/genesis_solar/index.html (last visited Nov. 16, 2010)). Other projects have been proposed and are awaiting approval, including Desert Sunlight Solar Farm, solar generation plant, with a nominal capacity of 550-megawatts, located just six miles from Desert Center, the area near the Kaiser project (U.S. Dep't of Interior, Desert Sunlight Solar Farm http://www.blm.gov/ca/st/en/fo/palmsprings/Solar_Projects/Desert_Sunlight.html (last visited Nov. 16, 2010), Palen Solar, with a nominal generation capacity of 500-megawatts, located ten miles from Desert Center (Cal. Energy Comm', Solar Millenium Palen,

http://www.energy.ca.gov/sitingcases/solar_millenniu m_palen/index.html (last visited Nov. 16, 2010)), and Rice Solar Energy Project, with nominal 150-megawatt capacity (Cal. Energy Comm'n, Rice Solar Energy Project—Power Plant Licensing Case, http://www.energy.ca.gov/sitingcases/ricesolar/index. html (last visited Nov. 16, 2010).

These projects cover thousands of acres, entail investment of billions of dollars, and are in the vicinity of the Kaiser project. Like Kaiser's project, these new solar projects will be subject to administrative review by the BLM and other agencies. If "flyspecking" triumphs over a holistic review of agency decision-making, many of these projects, which could provide thousands of jobs and needed revenue in the region, will be derailed.

CONCLUSION

The Petitioners raise an issue of great importance. The Kaiser project would have resulted in a net benefit for the Coachella Valley's regional environmental conservation efforts, and it was approved by the BLM and County of Riverside after a very lengthy administrative process. The results of that process should have provided certainty to Kaiser and regional players that the project would be permitted to move forward. But, the Ninth Circuit's position undermines the ability of agencies to make development decisions that stick. Many regional governments and actors had input into the BLM review process that resulted in approval of the Kasier land exchange. Now, as the result of technical errors that have no bearing on the BLM's substantive

decision, the results of the entire review process have been discredited and tossed aside. The Ninth Circuit's decision will significantly impact the Coachella Valley region. It will slow the CVCC's ability to complete the MSCHP, and will frighten future developers from pursuing projects in the area. For all of those reasons, the Court should grant Kaiser's petition for a writ of certiorari.

Respectfully submitted,

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ORIGINAL

IN THE
Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC., AND
MINE RECLAMATION CORPORATION,
Petitioners,
v.
NATIONAL PARKS & CONSERVATION
ASSOCIATION ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

AMICUS CURIAE BRIEF OF COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY IN SUPPORT OF KAISER EAGLE MOUNTAIN, LLC'S AND MINE RECLAMATION, LLC'S PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF KAISER EAGLE MOUNTAIN, LLC'S AND MINE RECLAMATION, LLC'S PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the County Sanitation District No. 2 of Los Angeles County (the "Sanitation District") respectfully moves for leave to file its brief as *amicus curiae* in support of Petitioners Kaiser Eagle Mountain, Inc. and Mine Reclamation, LLC's petition for a writ of certiorari.

On November 17, 2010, nine days prior to the filing of its brief, the Sanitation District provided notice to all parties requesting consent to the filing of its *amicus curiae* brief. Counsel for the Acting Solicitor General of the U.S. Department of Justice and counsel for Respondent National Parks Conservation Association have consented to the filing of this brief. Counsel for Petitioners Kaiser Eagle Mountain, Inc. and Mine Reclamation, LLC have also consented to the filing of this brief.

As of the time of this filing, counsel for Respondents Donna Charpied, Laurence Charpied, Desert Protection Society, and Center for Community Action and Environmental Justice, has not responded.

The Sanitation District respectfully requests that its motion for leave to file an amicus *curiae brief* be granted.

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[1] Due to an inadvertent calendaring error, the Sanitation District was unable to provide respondents with the 10-day notice required by Rule 37.2(a). That failure, however, is harmless in that the Sanitation District's brief will be filed more than 30 days prior to the due date for briefs in opposition, which has been extended to December 27, 2010. Therefore, respondents will suffer no prejudice from the lack of earlier notice.

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INTEREST OF AMICUS CURIAE

County Sanitation District No. 2 of Los Angeles County (the "Sanitation District") is a public agency organized under the provisions of the County Sanitation District Act, California Health and Safety Code, §§ 4700, *et seq.* The Sanitation District serves as the administrative district for an organization of 23 county sanitation districts that jointly provide a regional system of sanitary landfills and other refuse transfer and disposal facilities that meet the solid waste management needs for approximately 5.7 million people in Los Angeles County (the "Sanitation Districts").[1]

The Sanitation Districts are special districts that are formed as agencies of the State of California for the local performance of specific governmental functions. Under the County Sanitation District Act, the Sanitation Districts construct and operate major wastewater and solid waste transfer and disposal facilities that serve the residents of the County of Los Angeles. (Cal. Health and Safety Code §4741.) The directors of the Sanitation Districts are elected officials who are the presiding officers of the governing boards of the County of Los Angeles and the approximately 78 cities located within the Sanitation Districts' boundaries, including the City of Los Angeles. (Cal. Health and Safety Code §4730.) The Sanitation Districts are a regional governmental organization providing services that are essential to public health and safety.

The Sanitation District's interest in this case is based upon its purchase of the Eagle Mountain Landfill Project (the "Project") from Mine Reclamation LLC ("Kaiser") in August, 2000 in order to provide critical waste disposal

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person or entity, other than Amicus, made a monetary contribution to its preparation

capacity to Southern California. The time needed to construct and develop the Project's rail infrastructure is very lengthy, and requires that the Project proceed without unnecessary additional delay.

This case will determine how the Sanitation Districts will be able to provide an essential public service - solid waste management - to the second-largest metropolitan area in the nation. The Project is the cornerstone of a long-term plan to provide vital solid waste disposal capacity to Southern California for the next 100 years. The Court of Appeals' decision to vacate the Bureau of Land Management's ("BLM") approval of the land exchange and Environmental Impact Study ("EIS") and to then remand the case to BLM for further, and potentially lengthy, administrative proceedings, inadequately considers this overriding public purpose and will seriously and unnecessarily delay the implementation of this critically important public project. For these reasons, the Sanitation District supports the granting of the Petitioners' petition for writ of certiorari.

SUMMARY OF ARGUMENT

The Court of Appeal's Opinion (*National Parks Conservation Association v Bureau of Land Management, et. al*, 606 F.3d 1058, 1063, hereafter "Opinion") contains an erroneous analysis of the basis for, the impacts of, and the purposes underlying the Project. In view of the financial infeasibility of the Project and the nearest competing project as private operations, the highest and best use of the land involved is not landfilling.

The Opinion illogically cites eutrophication as a potentially significant impact of a waste-by-rail landfilling project and ignores the actual discussion of this issue in the EIS by focusing on the manner in which the EIS is organized and using that organization as reason to remand for further proceedings.

Finally, the Court's discussion of the Purpose and Need Statement essentially ignores the paramount public purpose underlying the Project in order to require a remand based upon private purposes that, in view of the now-public nature of the Project, are irrelevant to the transaction at issue in this case.

ARGUMENT

I. The "Highest and Best Use" Analysis of the Court of Appeals Ignores the Financial Infeasibility of the Project and the Mesquite Regional Landfill as Private Landfills.

The Court of Appeals' holding ignores the very reason that the Project is proceeding as a publicly-owned landfill—it was not financially feasible as a private landfill project. The Court's conclusion that the property's "highest and best use" is as a landfill fails to take into account the history of development of the Project and other waste-by-rail projects in Southern California.

During the 1950s, post-war development in Southern California began to create serious air quality problems in the Los Angeles Basin. One of the measures adopted to address these problems was a ban on the use of backyard incinerators. In order to provide for the management of the resulting volumes of refuse, the Sanitation Districts were charged with the task of developing a regional system of solid waste transfer and disposal facilities within the County of Los Angeles.

The Sanitation Districts eventually developed major sanitary landfill facilities throughout Los Angeles County specifically, the Palos Verdes Landfill located on the Palos Verdes Peninsula, the Calabasas Landfill located in

unincorporated Los Angeles County near the City of Calabasas, the Scholl Canyon Landfill in the City of Glendale, the Mission Canyon Landfill located in the City of Los Angeles, the Spadra Landfill located in the City of Pomona, and the Puente Hills Landfill, located in unincorporated Los Angeles County near the City of Whittier. The Puente Hills Landfill presently is the largest landfill in the nation and receives about one- sixth of the county's waste. By the 1970s, the Sanitation Districts' landfills were accepting approximately half of the approximately 29,000 tons per day of solid waste generated within the county.

Beginning in the 1970s, some of the Sanitation Districts' landfills began to reach capacity or require permit extensions. While it was then possible to obtain extensions for existing facilities over increasing community opposition, the development of new facilities within the county was rapidly becoming politically infeasible. New facilities were proposed at Main Mission Canyon, Elsmere Canyon, and elsewhere within the county, but were rejected or blocked by local opposition after the Sanitation Districts had undertaken major planning and engineering efforts. New technologies, such as converting refuse to energy, were also proposed and rejected. With the need for long-term solid waste disposal capacity continuing to increase and the available capacity within the county continuing to decrease, the Sanitation Districts established a committee of policy makers and stakeholders in the late 1980s charged with the responsibility to explore the available options and recommend policy that would provide guidance for the long-term management of the county's waste.

The resulting recommendations were eventually embodied in the County's official solid waste management plans, which were prepared in accordance with the California Environmental Quality Act ("CEQA") and other environmental quality analyses. Those recommendations called for a transition from local urban landfills to a system

of disposal that relies on remotely-located landfills accessed by rail. This system, known as waste-by-rail, represented a major shift in the manner in which solid waste was managed within the county. As a result, private operators began to propose remote landfill projects in various locations. One of those projects was the Kaiser proposal at Eagle Mountain, which is the subject of this litigation; another was the Mesquite Regional Landfill Project in Imperial County, the site of an existing gold mine. Other projects, such as rail cycle, were also proposed

During the 1990s, it became apparent that the private operation of these sites was financially infeas[illegible]e. The infrastructure costs to develop the required rail facilities and the added costs to construct large landfills that satisfied increased regulatory requirements were too great for the private sector. As established in the record, in 1994 Kaiser's investment partner, BFI, a major private landfill operator, walked away from the Project after having invested over $45 million in its permitting and development.

At this point, the Sanitation Districts concluded that, for waste-by-rail to become a reality and to meet the future solid waste disposal needs of Southern California, public involvement was necessary. In August, 2000, the Sanitation District agreed to acquire both the Eagle Mountain Landfill and the Mesquite Regional Landfill projects Together, the two projects would provide in excess of a million tons of capacity, capacity that would address the waste disposal needs of Los Angeles County for 100 years. The purchases of both projects were contingent upon the owners delivering to the Sanitation District a fully-permitted project, free of litigation, and with clear title to the necessary federal lands [2]

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[2] Footnote 1 of the Opinion erroneously states that the Sanitation District purchased the landfill property and permits "for over $8,800 per acre." The Sanitation District's purchase was for a fully permitted project, free of litigation, for a lump sum of $41 million The purchase price was not stated, calculated, or based in any way on a "per acre" amount The Opinion's description of the purchase is analogous to saying that the Sanitation District is purchasing a car "for over $10,000 per tire "

The Mesquite Regional Landfill project was the first project to resolve its litigation contingency and was purchased by the Sanitation District. This facility, permitted at 20,000 tons per day, has the potential to provide approximately half of the long-term capacity needs for the county. The Sanitation Districts have devoted over 10 years and spent over $323 million developing the Mesquite Regional Landfill and constructing the infrastructure needed to containerize the waste and load it on rail cars for shipment to that facility. An additional $64 million will be required to complete this portion of the system.

The Sanitation Districts' largest landfill, the Puente Hills Landfill, which is permitted to receive about 13,200 tons of waste per day, is scheduled to close in 2013. Other in-county private and public landfills have limited capacity and will eventually close. As operations at these in-county facilities are concluded, the additional remote disposal capacity at Eagle Mountain will become critical, and the rail infrastructure needed to access the Eagle Mountain Landfill must be in place.

The development duration and cost of the infrastructure for the Project will be comparable to the duration and cost of developing the Mesquite Regional Landfill infrastructure. Given the long lead time necessary to develop and obtain permitting for these facilities, progress must occur now to secure the additional solid waste capacity needed for Los Angeles County.

The Court of Appeal observes that, in *Desert Citizens Against Pollution v. Bisson* (9th Cir. 2000) 231 F.3d 1172, the court used the presence of the competing landfill proposal at Eagle Mountain to establish that there was a market for land that can be used as a remote landfill, and that landfill use was, therefore, the highest and best use of the exchange lands for the Mesquite Regional Landfill. (Opinion at pp. 1067-1068) The Opinion then assumes that the reverse must

also be true, and concludes that the highest and best use of the Kaiser lands must be as a landfill because of the competing Mesquite project. (*Ibid*.)

The premise of the Court's logic is flawed. The Sanitation District purchased both projects for the costs invested by the developers in obtaining their permits, since the private operation of both projects was no longer financially feasible. No value was assigned to the lands or any other aspect of the projects. Neither project therefore had any market value and cannot be used as evidence of the existence of any actual market for such projects. Therefore, a landfill is not necessarily the highest and best use of the lands at issue.

II. "Eutrophication" is Not a Significant Environmental Impact For a Modern Waste-By-Rail Landfill Project.

The project opponents' "eutrophication" argument, which captured the attention of the Court of Appeals, is wildly exaggerated, if not entirely groundless. It is an invented concept that has no relationship or application to the actual operation of a modern sanitary landfill or the Project. No purpose would be served by remanding this case for further analysis of this issue.

The EIS describes the operation of a waste-by-rail system. This operation begins with the loading of municipal waste into sealed containers, which are then transported from the urban environment to the desert by rail. Upon arrival at the remote landfill, the containers are transferred to trucks and transported to the lined disposal area of the landfill, where they are unloaded and the waste compacted into cells by heavy equipment. Each cell is covered with soil or other approved materials at the end of each day. Normal landfill operating procedures and strict regulatory

requirements prevent the entry of vectors into the disposal area. Common sense does not support the eutrophication argument or the Court's assumption that eutrophication is a significant issue.

Not only is the eutrophication issue insignificant, but it was already fully and properly addressed in the EIS. The Department of the Interior's Board of Land Appeals ("IBLA") specifically noted that waste materials would be delivered "in sealed and locked containers" and that waste would be confined to the site by applying interim cover on a daily basis and final cover when a given area of the landfill reaches capacity. (Pet. App. "C".) The IBLA also explained that "BLM's approval of the Project is subject to ongoing monitoring." (*Id.*) It is not clear what further proceedings are necessary for the BLM to comply with the Court's ruling since it has already told the BLM how to reorganize the EIS. The Court simply remands the issue to the agency to simply reorganize its discussion – again to the substantial detriment of the 5.7 million residents of Los Angeles County.

III. The Court of Appeals' Invalidation of the Purpose and Need Analysis of the EIS Due to the Inclusion of Kaiser's Private Interests is Erroneous and Contrary to the Real Public Purpose Underlying the Project.

The Opinion notes that the Statement of Purpose and Need in the EIS for the Project states that the " . . . primary purpose of the Project is to develop a new Class III nonhazardous municipal solid waste landfill to meet the projected long-term demand for environmentally sound landfill capacity in California. . . ." (Opinion at p. 1063.) The Court then invalidated the Statement of Purpose and Need because it included several "Kaiser-related" secondary purposes.

Since the Sanitation District has agreed to purchase the Project for public use, the only relevant purpose is the public purpose identified as the "primary purpose." There is no reason to remand the EIS to the BLM for further evaluation of Kaiser's now-irrelevant secondary private purposes. The primary Statement of Purpose and Need already meets the statutory requirements and is actually in accord with the Court's determination that the purpose and need must include a public dimension.

This Project has been the subject of exceptional public and regulatory scrutiny throughout the environmental review process. The public interest in p ecting the environment has been fully addressed and any potential impacts have been exhaustively addressed, analyzed, and mitigated. The public interest in obtaining appropriate valu for the federal government in the federal land exchange has been fully and fairly determined by the BLM, which will be receiving thousands of acres of environmentally-sensitive desert lands for the benefit of the public (See *Friends of Southeast's Future v. Morrison,* 153 F.3d 1059, 1066 (9th Ci Alaska 1998) regarding the "considerable discretion" afforded to agency determinations). The National Park system has resolved its concerns about the Project by agreement with Kaiser. The public interest **not** appropriately considered by the Court is the paramount public interest of the Sanitation Districts, and the residents of Southern California, in securing the availability of an essential public service that is critical to the public health and safety by allowing for the transition from urban landfills to the remote disposal of waste by rail.

Although the Court was fully aware of the acquisition of the Project by the Sanitation Districts (Opinion, footnote 1, at p 1063), and the Sanitation Districts' public purposes and projects are facts of common knowledge, these critical interests were not given

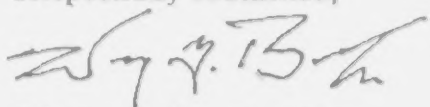
appropriate weight. The continuing litigation delays affecting the Eagle Mountain Landfill Project are highly detrimental to the public interest. No action can be taken to commence development of the materials recovery and rail-loading facilities needed to serve the Eagle Mountain Landfill Project until the acquisition is completed and the Project's disposal capacity has been secured by the public.

These interests are not adequately considered in the Court of Appeals' decision. The Court's decision to remand this matter to complete work that has already been performed or is irrelevant will materially interfere with the Sanitation District's ability to plan and provide for the long-term waste disposal needs of Southern California.

CONCLUSION

For the reasons stated above, the Petitioners' petition for certiorari should be granted.

Respectfully submitted,



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In The
Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC., and MINE RECLAMATION CORPORATION,
Petitioners,

v.

NATIONAL PARKS AND CONSERVATION ASSOCIATION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR JUDGE CRAIG MANSON AND L. MICHAEL BOGERT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF FOR *AMICI CURIAE*

Judge Craig Manson and L. Michael Bogert respectfully move for leave to file the following brief as *amici curiae* in support of the petition for certiorari. Petitioners have consented to the filing of this brief. Respondents have not responded to a request for consent.[1]

Amici's interest in this case arises from their past service as an officer and an attorney within the Department of the Interior with responsibility for compliance with or advice regarding the National Environmental Policy Act (NEPA), at issue in this case. Their past positions, experience, and interest in this case are more fully described in the brief, at 1-3.

This brief will the burdens on federal decisionmaking created by an excessive and impossibly demanding application of NEPA, such as reflected in the decision below.

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[1] Due to a late decision to participate in this case, and similarly late acquisition of Supreme Court counsel, *amici* were unable to provide respondents with the 10-day notice required by Supreme Court Rule 37.2(a). That failure, however, is harmless in that such notice was designed to allow respondents to seek an extension in order to address arguments by any *amici*, and respondents in this case have already sought and received an extension. This brief thus will be filed more than 30 days prior to the due date for briefs in opposition, and respondents will suffer no prejudice from the lack of earlier notice.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE* [1]

Amici are former federal public servants who, in their official roles, had responsibility for complying with the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (NEPA).

Judge Craig Manson was the former Assistant Secretary for Fish, Wildlife and Parks at the Department of the Interior. Prior to that, he was a Superior Court Judge for the County of Sacramento. Prior to that, he was the Chief Counsel to the California Department of Fish and Game where, among other responsibilities, he advised his client agency on its obligations under the California Environmental Quality Act, a statute similar, though not identical, to NEPA.

L. Michael Bogert is former Counselor to the Secretary of the Department of the Interior, where he was responsible for advising the Secretary on law and policy as it related to land-use decisions and compliance with, *inter alia*, the Federal Land Policy Management Act and the Endangered Species Act, both at issue in this case.

Amici have first-hand experience and knowledge of the often unduly burdensome interaction between NEPA's procedural requirements and the underlying substantive environmental laws governing land management and other decisions. They know well the seemingly intractable process that emerges under

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

NEPA, even when all other substantive requirements of law have been fully satisfied by the federal government. *Amici* have lived with the inherent imperfection in federal land use decision making and, in many instances, have inherited the burdensome demands for unrealistic perfection imposed by judicial review of their work under NEPA.

Amici likewise have considerable first-hand experience with the length of time that it takes to manage environmental analysis through NEPA and, in some instances, have been named as defendants in NEPA lawsuits. They have a practical understanding of the delays caused by litigation on the adequacy of NEPA documentation and thus have an interest in this case as an exemplar of judicial micro-management of a statutory framework that Congress never intended to require the unattainable perfection demanded by the federal courts in the Ninth Circuit. *Amici* have been part of lawful and valuable efforts by their client agencies to collect environmental assets that would benefit the United States, its citizens, and the environment in accordance with the ESA and the FLPMA, but which were rendered more costly and burdensome by having to comply with unreasonable and irrational interpretations of NEPA by litigants and the courts.

Finally, *amici* hail from the Western United States which, as in this case, is the *locus in quo* of many disputes under NEPA. They are familiar with the interplay between federal land-management policy and species protection in that geography, the law emanating from the Ninth Circuit, and the unique burdens

that court has imposed on decisions regarding land in that Circuit.

STATEMENT

The Ninth Circuit in this case aggressively and erroneously applied NEPA to vacate and remand a decade-old land-exchange decision by the Bureau of Land Management based on trivial purported errors of form that virtually define the category of harmless errors. It did so despite the Bureau's herculean efforts to comply with NEPA both before and after its decision, including:

- over a decade of pre-decision review beginning in 1989, which produced over 50,000 pages of administrative record;
- review by multiple federal and state agencies under both federal and state environmental laws;
- consideration of multiple alternatives, including the option of doing nothing at all;
- production of a 900-page draft and 1600-page final Environmental Impact Statement (EIS);
- successful defense of state law challenges to the land-exchange decision;
- supplementation of the record in response to new objections based on intervening standards imposed by the Ninth Circuit well after the underlying land-use decision was made in this case;
- over 10 years of litigating this current challenge to the Bureau's decision; and

- the expenditure of $80 million on the process.

Pet. at 1, 4-10.

Despite such efforts the Ninth Circuit found fault in the *form* of the Bureau's EIS, vacated the land-exchange decision, and remanded the matter back to the agency for still further proceedings and, inevitably, many years of subsequent and pointless litigation over the next iteration of the EIS. Pet. App. at 35.

The purported faults the Ninth Circuit found might well have been drafted by Lewis Carroll and articulated by the Queen of Hearts. According to the court below, the EIS:

- had a deficient summary paragraph because it supposedly included several sentences *too much* – even though such sentences addressed a particular question the Bureau was required by law to address, Pet. App. 23-29;
- was deficient in its extensive discussion of the issue of "eutrofication" because it mentioned the issue too often and in too many places, rather than addressing it in its own section and under its own heading, Pet. App. 32;
- did not consider a land-valuation methodology never argued in the administrative proceedings, imposed by a post-EIS decision of the Ninth Circuit, but which was in fact addressed when the Bureau supplemented the record in response to the new

argument being raised during litigation, Pet. App. 15-20 & n. 5.

In the face of such imaginary flaws, there was no doubt that the Bureau's decision satisfied all substantive environmental standards, had been subjected to a "hard" – one might say diamantine – look, and would not conceivably change as a result of the remand. In short, the remand served no purpose whatsoever, other than to add expense and further delay to the consummation of a beneficial land-exchange that has already been delayed by a decade of litigation.

SUMMARY OF ARGUMENT

The National Environmental Policy Act requires government agencies to follow a careful procedural regimen when making decisions that have potential environmental impacts. It is designed to ensure that decision-makers take a "hard look" at environmental concerns, but it does not require any particular outcome. Outcomes are determined by other statutes regulating the environment, the agency, or the subject matter of the decision.

But where the substance of a decision faces opposition, plaintiffs and some courts have used NEPA's procedural overlay to achieve the substantive results of blocking government decisions by entangling them in endless litigation over minor and harmless alleged procedural flaws. The excessive flyspecking of NEPA documentation drives up the time and expense it takes to prepare such documents, prolongs litigation over NEPA compliance after a decision, often delaying implementation of that decision, and demands an

unattainable procedural perfection that gives litigants and the courts a substantive veto on agency decisions.

This case is a particularly appropriate vehicle for reigning in the excesses by some courts in their application of NEPA. The underlying land-use decision in this case underwent 10 years and millions of dollars of review, resulting in a 1600-page EIS. After another 10 years of litigation, the case was remanded to the agency not because of any substantive flaws in the decision, but because of imagined and harmless errors that have nothing to do with NEPA's goal of diligent environmental decision-making.

Obstruction in the name of procedure is a serious distortion of NEPA and of the federal court's role in enforcing it. Unfortunately, such obstruction under NEPA is not unique to this case, seems to be a pattern in the Ninth Circuit, and has required this Court's attention and correction in other cases. This case – being one of the most egregious examples to date – offers an appropriate vehicle to once again reign in such abuses and return NEPA to its proper procedural role of encouraging sound decision-making rather than rendering it impossible actually to implement those decisions due to endless and pointless procedural delay.

ARGUMENT

I. NEPA Litigation Is Extensive and Now Imposes Burdens Well Beyond those Intended by Congress.

The National Environmental Policy Act was designed by Congress to provide a *process* by which federal entities make environmental decisions under other statutes defining an agency's substantive environmental obligations. "NEPA itself does not mandate particular results." *Robertson* v. *Methow Valley Citizens Council,* 490 U.S. 332, 350 (1989). Rather, it is simply a means of ensuring that agencies take a "hard look" at the issues before them. *Kleppe* v. *Sierra Club,* 427 U.S. 390, 410 n. 21 (1976).

While NEPA's procedural overlay on decisions potentially subject to substantive environmental statutes will inevitably impose some additional costs and burdens, those costs and burdens have grown well out of proportion to NEPA's simple procedural goals.

According to the Council on Environmental Quality (CEQ), the federal agency with policy oversight of NEPA, "brief" environmental assessments (EAs) typically range from 10 to 30 pages in length, require from two weeks to two months to complete, and cost between $5,000 and $20,000. Larger environmental assessments associated with controversial or high profile projects, typically range from 50 to more than 200 pages in length, require from nine to 18 months to complete, and cost between $50,000 and $200,000.[2]

---

[2] *See* NEPA Task Force Report to the Council on Environmental Quality, *Modernizing NEPA Implementation* (Sept.

For projects with potentially significant environmental impacts a still longer EIS must be prepared. EISs typically range from 200 to more than 2,000 pages, require from one to more than six years to complete, and cost between $250,000 and $2 million.[3] Since 2004, approximately 3,812 EISs have been published by Federal agencies.[4] Assuming a reasonable EIS median cost of $1.125 million based on CEQ data, this has resulted billions of dollars expended for NEPA compliance since 2004. And that figure does not even include the cost of environmental analysis obligations earlier in the NEPA process.

Protracted litigation over NEPA's requirements imposes still further costs on federal decision-making, particularly in connection with land-management decisions. According to CEQ, out of 132 NEPA cases filed in 2008, 77 cases can be described as "public lands" cases, for an approximate total of 58 percent of all the outstanding NEPA litigation.[5] Most cases are brought by so-called "Public Interest Groups," which typically oppose the underlying decisions on substantive or policy grounds and seek to block the decisions through any available means. NEPA litigation data from 2008 reveal that of 374 total plaintiffs, 210 were characterized as "Public Interest Groups," with State Government NEPA plaintiffs numbering only 13.[6]

2003) at 65-66, *available at* http://ceq.hss.doe.gov/publications/modernizing_nepa_implementation.html.

[3] *Id.* at 66.

[4] *See http://yosemite.epa.gov/oeca/webeis.nsf/viEIS01?OpenView.*

[5] *See* http://ceq.hss.doe.gov/nepa/NEPA2008LitigationSurvey.pdf.

[6] *Id.*

In cases such as this one, "NEPA litigation – either to decide whether an EIS is required or to determine its adequacy once it is produced – adds further costs and delays. Fear of judicial review pushes agencies toward ever-lengthier and more elaborate EISs, responding to all major comments received in the public notice and comment period." Bradley C. Karkkanian, *Wither NEPA?*, 12 N.Y.U. ENVT'L. L.J. 333, 339 (2004).

Unfortunately, NEPA's procedural requirements have been hijacked by litigants and the courts to serve private purposes unrelated to NEPA's procedural goals. Litigants and the courts – particularly in the Ninth Circuit – have used NEPA to create byzantine and counterproductive requirements that threaten to delay or derail decisions that plainly satisfy all substantive environmental standards, have received the requisite "hard look," but that continued to be opposed by third parties for policy reasons. As noted by one commenter, NEPA plaintiffs "place[] a high value on NEPA because it affords extraordinary opportunities to throw up procedural roadblocks that may delay or kill projects" that they oppose. Karkkanian, 12 N.Y.U. ENVT'L. L.J. at 339.

Such litigation vindicates no substantive environmental policies, but rather simply adds to the financial burdens that must be borne by federal agencies, even where they scrupulously discharge their substantive environmental obligations under statutes such as the FLPMA, the ESA, and the National Forest Management Act. By demanding unreasonably and impossibly perfect satisfaction of invented glosses on NEPA's procedural requirements, such lit-

igation and court decisions stifle creativity in land-management decisions and undermine decisions that actually benefit the environment.

This case is a clear example of trivial and fictitious NEPA obligations being used to stifle such beneficial – and substantively lawful – federal decisions.

II. This Case Is an Especially Appropriate Vehicle for this Court to Reinforce the Judiciary's Narrow Role in Implementing NEPA.

This case is an especially stark example of a federal court using manufactured procedural hurdles under NEPA, and utterly harmless supposed errors, to block implementation of substantively lawful land-use decisions. As Judge Trott observed in dissent below, "[o]ur well-meaning environmental laws have unintentionally made such an endeavor a fool's errand." Pet. App. at 35.

Judge Trott is meticulous, and justly scathing, in his criticism of the process thus far and of the opinion below.

Regarding the long road travelled just to reach this point in the litigation, Judge Trott observes that the process started in 1989 with an application to the Bureau for the land exchange. The final NEPA EIS was issued in 1996, and affirmed on administrative appeal in 1999. It then was challenged in federal court "in 1999 – 10 years ago." Pet. App. 43.

> The case took over five years in district court simply *to get to summary judgment!* It took the court *three years* to rule on the completed motions, and, here we are at the end of 2009, another five years later, burdened by a se-

> riously flawed district court opinion, hitting the reset button, and unnecessarily sending the parties back to a Sisyphean hill which cannot be climbed in a lifetime – ten years after the IBLA's opinion. How many of the people who started this project are still employed by Kaiser, are still in public service, or for that matter, are still alive? Yet, the *process* has developed an eternal life of its own as full employment for all swept along with or by it.

Id. (emphasis in original).

Regarding the summary of purpose and need in the EIS – rejected for deigning to include a required mention of *Kaiser's* goals in conducting the exchange – Judge Trott marvels that his colleagues

> grudgingly conclude that the BLM adequately determined that the public interest is served by the landfill, but, in the same breath, they claim to have found a defect in BLM's *articulation* of the project's purpose and need.

Pet. App. 54 (emphasis added).

Regarding the EIS's treatment of the "eutrofication" issue – rejected for appearing in multiple locations rather than in its own consolidated section – Judge Trott notes that

> (1) it was the [plaintiffs'] burden to identify the failures they alleged, (2) the California Court of Appeal thoroughly examined and analyzed the eutrophication allegations in 1999 and had no trouble finding its way through the record, (3) I had no trouble finding eutrophication in this voluminous record, and (4) neither

> did the IBLA. * * * Only someone intent on not finding what they hoped was not there could fail to locate matters of their concern in this admittedly gigantic document.

Pet. App. 68-69.

And regarding the Bureau's analysis of the monetary value of the land being exchanged – rejected for not anticipating a valuation method never raised in the administrative proceedings, imposed by a *subsequent* Ninth Circuit decision, and then fully addressed during litigation via supplementation of the record – Judge Trott ruefully notes that the "final irony is that my colleagues send the case back to the [Bureau] to do something [it] has already done: consider the value of the land involved as a commercial landfill." Pet. App. 36. Indeed, he concludes, the Bureau "has thoroughly 'considered' the issue and issued a manifestly defensible answer. To remand at this point is a clear exercise in blind form over substance." Pet. App. at 96

Judge Trott properly characterizes this case as "yet another example of how daunting – if not impossible" – it is to obtain federal approval for land use decisions likely to be opposed by self-appointed public interest advocates. Pet. App. at 35. Judge Trott ultimately observes – flamboyantly, though not incorrectly – that even measured against the mythic obstacles faced by Ulysses on his return trip to Ithaca, "nothing * * * compares to the 'due process' of unchecked environmental law." Pet. App. at 35-36.

Unfortunately, "the endless process continues":

> No doubt we will see this case back again, years from now, unless the proponents of this

> project – including seven California counties – weary of it and throw in the towel, thwarted and defeated not by substance, but by interminable process.

Pet. App. at 43 (Trott, J., dissenting).

Such problems are not unique to this case, but unfortunately reflect a pattern in the Ninth Circuit. *See, e.g.*, *Native Ecosystems Council* v. *Tidwell*, 599 F.3d 926, 929 (CA9 2010) (remanding updates to grazing allotments because the Forest Service supposedly failed to take the requisite "hard look" under NEPA); *id.* at 938 (Kozinski, J., dissenting) ("The majority oversteps the limited role of a court reviewing an agency's decision," in holding that the Forest Service's "216-page Environmental Assessment * * * and a bevy of supplemental reports" failed to satisfy NEPA's "hard look" requirement); *Center for Biological Diversity* v. *United States Dept. of Interior*, 623 F.3d 633, 636-41 (CA9 2010) (remanding because Bureau of Land Management supposedly failed to take a sufficiently "hard look" at a land exchange proposed in 1994, approved in 2000, affirmed on administrative appeal in 2004, but rejected by the Ninth Circuit in 2010); *id.* at 651 (Tallman, J., dissenting) (criticizing the majority for failing to exercise the "proper level of deference owed to agency determinations made within the agency's area of expertise" and endeavoring "to impermissibly expand the scope of judicial oversight and scrutiny of agency action"). The current case, however, is among the most egregious abuses of NEPA by the Ninth Circuit.

Given the extreme nature of the Ninth Circuit's actions below, and the sheer pointlessness of the re-

mand, the petition in this case affords this Court an excellent vehicle for reigning in the destructive excesses of certain federal courts under NEPA.

This Court is not unfamiliar with correcting judicial maneuvering under NEPA by lower federal courts. In both *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), and *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), this Court checked the overzealous tendency of the Ninth Circuit to issue injunctions as a matter of course in NEPA cases. Such injunctions interfered with substantively lawful federal activity and improperly elevated procedural requirements to substantive barriers.

In both cases this Court overruled decisions of the Ninth Circuit that had misused NEPA and converted it into a sword by which plaintiffs could collaterally challenge substantive decisions with which they disagreed. As this Court held in *Monsanto*, however, it is not the law "to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances." 130 S. Ct. at 2757. And NEPA places no "thumb on the scales" for use in blocking substantively lawful decisions. *Id.* And in *Winter*, this Court chided the Ninth Circuit for "significantly understat[ing] the burden the preliminary injunction would impose on the [the Navy] * * *, and the injunction's consequent adverse impact on the public interest in national defense." *Winter*, 129 S. Ct. at 377.

The lessons of *Monsanto* and *Winter* are that this Court will not tolerate inferior federal courts using NEPA as a license to invade the underlying merits of agency decision-making. Just as this Court con-

fronted the abuse of NEPA in *Monsanto* and *Winter*, the Ninth Circuit here has once again exaggerated and expanded the burdens imposed by marginal elements of NEPA's procedural requirements. The supposed errors vigorously teased from the administrative record by the Ninth Circuit below are at best harmless and at worst imaginary, and they are currently blocking implementation of a substantively lawful and beneficial land exchange. As it did in *Monsanto* and *Winter*, this Court should grant the petition to correct such unwarranted obstructionism.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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No. 10-548

IN THE

Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC., *et al.*,
Petitioners,

v.

NATIONAL PARKS & CONSERVATION ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* NEW KAISER VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

No. 10-548

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NATIONAL PARKS & CONSERVATION ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

New Kaiser Voluntary Employees' Beneficiary Association ("VEBA") hereby respectfully moves for leave to file its Brief *Amicus Curiae* in this case. The brief was filed with the Court on November 24, 2010. The consent of counsel for all parties, save one, has been obtained. The consent of counsel for Respondents Donna Charpied, Laurence Charpied, Desert Protection Society, and Center for Community Action and Environmental Justice was requested but their counsel has made no response to the request.

The interest of the VEBA in this case arises from the fact it is a non profit trust of former steel workers and their dependents who lost lifetime medical, death and disability benefits during the 1987 bankruptcy of Kaiser Steel Corporation. When VEBA first became

involved in the Eagle Mountain project in June 1988, it had approximately 7,000 members. Today, VEBA has approximately 3,000 members, most whom reside in Riverside County, California where the Eagle Mountain landfill will be located. As VEBA's chairman commented during the public hearings on this project, for the VEBA members this project represents the last opportunity to restore full medical, death and disability benefits for VEBA's members. This is because VEBA holds approximately ten percent of the beneficial units of Kaiser Ventures, LLC, the parent organization of Petitioners. For those remaining members, a project delayed is a project and benefits denied. The average age of the members is now 80, and they simply cannot wait another ten or twenty years.

The VEBA's *amicus* brief presents to the Court useful information regarding the potential impact of the decision below not only on Petitioners but also on the broader community in Southern California that will be served by the proposed Eagle Mountain Landfill Project. It is believed that VEBA's *amicus* brief contains relevant argument that will assist the Court in determining whether to grant the Petition.

Respectfully submitted,

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November 24, 2010

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BRIEF OF *AMICUS CURIAE* NEW KAISER VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION IN SUPPORT OF PETITIONERS

IDENTITY AND INTEREST OF *AMICUS CURIAE* [1]

New Kaiser Voluntary Employees' Beneficiary Association ("VEBA") is a non-profit trust of retirees and their dependents who lost lifetime medical, death

[1] The parties were provided with timely notice of the intent to file this brief. The consent of counsel for all parties, save one, has been obtained. The consent of counsel for Respondents Donna Charpied, Laurence Charpied, Desert Protection Society, and Center for Community Action and Environmental Justice was requested, but their counsel has made no response to the request. Our Motion for Leave to file this Brief is appended hereto. Counsel for a party did not author this brief in whole or in part. No person or entity other than *Amicus Curiae* made a monetary contribution to the preparation and submission of this brief.

and disability benefits during the 1987 bankruptcy of Kaiser Steel Corporation. Those benefits are now provided by VEBA using funds it acquires from Kaiser Ventures LLC, the parent organization of Petitioners Kaiser Eagle Mountain, Inc. and Mine Reclamation Corporation (now, respectively, Kaiser Eagle Mountain LLC and Mine Reclamation LLC).

During the period from 1948 to 1983, Kaiser Steel Corporation mined iron ore on Eagle Mountain and transported it to its foundry in Fontana, California. Upon cessation of its steel making activities, a large open pit mine had been created by the mining activities. It is that cavity on the earth's surface that Petitioners in this litigation have been attempting, for over twenty years, to achieve regulatory permitting so that they may operate the site as a Sanitary Landfill. The project and its extent, 4,654 acres with a designed capacity of 117 years, is described in the Ninth Circuit's published opinion. *See*, *National Parks & Conservation Association v. Kaiser Eagle Mountain Inc.*, 606 F.3d 1059, 1062 (9th Cir. 2009) (Majority Opinion by Judge Pregerson,), 1076 (Judge Trott dissenting, noting the endeavor has so far cost Petitioners over $50,000,000).

VEBA first became involved in the Eagle Mountain project as a part of the Kaiser Steel Corporation Bankruptcy Plan of Reorganization. In June 1988, it had approximately 7,000 members. Today, VEBA has approximately 3,700 members, a large number of whom reside in Riverside County, California. As VEBA's Chairman commented during the public hearings on this project, for the VEBA members this project represents the last opportunity to protect full restoration of benefits for VEBA's members. This is because of two factors:

First, VEBA cannot provide full health care to its participants, as had been promised by the former Kaiser Steel Corporation, as funds are inadequate to do so without proceeds from the VEBA's interest in the company. Consequently, members still have substantial health care expenses to pay for out of pocket, even as they subsist on modest retirement incomes and despite the fact their former employer promised them lifetime health care.

Second, VEBA holds approximately 10% of the beneficial units of Kaiser Ventures LLC, Petitioners' parent. The revenues that will be received from such users of the landfill as the Los Angeles County Sanitation Districts (which has agreed to pay over $40,000,000 for use of the facility), when realized as income to the beneficial interest holders, will allow VEBA to cover far more of its members' health-related expenses than it now can.

And the census figures tell a grim story: the average age of VEBA members is now 80. For those remaining members, a project delayed means a project and benefits denied. Based on actuarial studies, the current population's attrition rate will accelerate in the very near future. These people simply cannot wait another ten or twenty years for their benefits.

The decision of the Ninth Circuit ensures that the public will never realize the many important benefits of the project. Instead, the project will take on an "eternal life of its own," as Judge Trott notes. (*National Parks & Conservation Association v. Kaiser Eagle Mountain Inc.*, 606 F.3d 1058, 1078.) VEBA members and members of the public and regional interests have invested over a decade in analyzing the Eagle Mountain project, speaking at various

public meetings, submitting written comments, and developing (and redeveloping) plans for completion of the project. Sending the Bureau of Land Management back to the drawing board once again will cost this region, its businesses, and its residents (notably including VEBA members) many more years of lost revenue and opportunities for economic development. There has been more than enough agency decision-making and public participation to assure the proper vetting of the project. To continue on this treadmill is in the words of Judge Trott: "sending the parties back to a Sisyphean hill which cannot be climbed in a lifetime." (*Id.*)

The Court should grant the Writ so that the project can finally proceed as intended.

ARGUMENT

The Ninth Circuit has reviewed many District Court decisions that in turn have considered Agency conclusions in matters similar to those involved in this matter. The body of that decisional law has been largely consonant with the decisions of other Circuits on the scope of review to be accorded the Agencies' determinations. Petitioners have presented the Court with a detailed analysis of the decisions of other Circuits and this Court's decision in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (rejecting the invitation to "convert judicial review of agency action into a ping pong game"). Those decisions advocate persuasively that the Ninth Circuit's decision in this case is not in balance with those better-reasoned decisions. The VEBA does not here repeat those arguments. But we do call to the Court's attention that precedent in the Ninth Circuit is contrary to the decision of the court below in this case.

I. CONTRARY TO EXTANT NINTH CIRCUIT PRECEDENT, THE DECISION BELOW FAILS TO APPLY A "RULE OF REASON" IN ITS REVIEW OF AGENCY DECISIONS.

Several decisions of the Ninth Circuit have applied a "rule of reason" standard when reviewing the adequacy of an agency's environmental impact statement for purposes of the National Environmental Policy Act ("NEPA"), under which the court asks whether an Environmental Impact Statement ("EIS") contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences. *See, e.g., Churchill County v. Norton*, 276 F.3d 1060, 1071, 1081 (9th Cir. 2002) (Opinion by Judge Paez):

> Review under the rule of reason and for abuse of discretion "are essentially the same." (Citations omitted.)
>
> . . . Under this standard, we ask "whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences. (Citation omitted.) [W]e make "a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation." *Id.* Review under the rule of reason and for abuse of discretion "are essentially the same." (Citations omitted.) (276 F.3d at 1071)
>
> Plaintiffs have pointed out errors and missing information in the [Water Rights Acquisition for Lahontan Valley Wetlands, Churchill County, Nevada] WEIS. We could certainly "fly-speck" this chapter of the WEIS and find instances where the inclusion of quantitative data would

benefit the Service and the public. As with the programmatic EIS discussed above, if we were preparing the WEIS, we might insist on additional detail. That is not our role, of course. Rather, we review the legal sufficiency of the WEIS. We conclude that the Fish and Wildlife Service has taken the requisite "hard look" at the cumulative environmental impacts of the action alternatives and has not violated NEPA. (276 F.3d at 1081)

II. PERCEIVED FLAWS IN AN EIS ARE NOT, ALONE, SUFFICIENT TO CAUSE REMAND TO THE AGENCIES.

In *Cady v. Morton*, 527 F.2d 786 (9th Cir. 1975), the court made this point emphatically:

> While we would have preferred a somewhat more detailed and better organized treatment of the proposed reclamation plans and although parts of the discussion are couched in the 'conclusory form' we consider less than optimal, we cannot say that the EIS is inadequate in this regard.
>
> Neither [NEPA] Section 102(2)(B) or (C) (42 U.S.C. § 4332(2)(B) or (C)) can be read as a requirement that complete information concerning the environmental impact of a project must be obtained before action may be taken. If we were to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated." (527 F.2d at 796)

CONCLUSION

Because the decision below is so irreconcilable with the decisions of other Circuits and within the Ninth Circuit, as well as with the view of this Court in *NLRB v. Wyman-Gordon Co.*, *supra*, and because it threatens to make environmental litigation endless, the Court should grant the Petition.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS KAISER EAGLE MOUNTAIN, INC., AND MINE RECLAMATION CORPORATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37(2), Pacific Legal Foundation respectfully moves this Court for leave to file an *amicus curiae* brief in support of the Petition for a Writ of Certiorari filed by Kaiser Eagle Mountain, Inc., and Mine Reclamation Corporation (Kaiser).

Counsel of record for all parties received the Foundation's notice of intent to file a brief *amicus curiae* at least ten days prior to the brief's filing. Counsel for Petitioners Kaiser, Respondents United States Department of the Interior, *et al.*, and Respondent National Parks and Conservation Association have consented in writing to this filing. Consent letters have been lodged with the Clerk of this Court.

Counsel for Respondents Donna Charpied, *et al.*, did not respond to Pacific Legal Foundation's repeated requests for consent to file. Pacific Legal Foundation, therefore, respectfully submits this motion for leave to file the attached *amicus curiae* brief.

Pacific Legal Foundation respectfully requests that its motion for leave to file an *amicus curiae* brief be granted.

DATED: November, 2010.

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QUESTION PRESENTED

Does a court err by vacating an agency's action and remanding for further administrative proceedings that will have no effect on the agency's decision or serve any other substantive purpose?

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation is a nonprofit, public interest organization that provides a voice in the courts for Americans who believe in limited government, private property rights, and individual freedom. Thousands of individuals, organizations, and associations support the Foundation's efforts nationwide.

In this case, the Ninth Circuit has determined that a federal agency may not take into account the objectives of a private applicant when considering alternatives for a joint federal-private project under the National Environmental Policy Act (NEPA). This crabbed reading of the Act raises an important question about the scope of environmental review under federal law and adds to a split among the circuits. Resolution of this conflict would further the public interest.

Pacific Legal Foundation participated as *amicus curiae* in support of Kaiser's petition for rehearing *en banc* below and has participated in many Supreme

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[1] Counsel of record for all parties received the Foundation's notice of intent to file a brief *amicus curiae* at least ten days prior to the brief's filing. Counsel for Petitioners Kaiser, Respondents United States Department of the Interior, *et al.*, and Respondent National Parks and Conservation Association have consented in writing to this filing. Consent letters have been lodged with the Clerk of this Court.

Counsel for Respondents Donna Charpied, *et al.*, did not respond to Pacific Legal Foundation's repeated requests for consent to file.

No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person or entity, other than Amicus, made a monetary contribution to its preparation.

Court cases involving NEPA. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983).

The Foundation's *amicus curiae* brief in this case emphasizes the significant conflict over the requirements of a NEPA purpose and need statement that exists between the Ninth Circuit's decision below and a similar decision from the Seventh Circuit and contrary decisions from the D.C. Circuit and Tenth Circuit. This conflict is described in detail in Pacific Legal Foundation's amicus curiae brief and provides a compelling reason for this Court to grant Kaiser's Petition for a Writ of Certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is typical of the "result-oriented" decisions from the Ninth Circuit with which this Court is all too familiar. *See National Parks & Conservation Ass'n v. United States Dept. of Interior*, 606 F.3d 1058, 1079 (9th Cir. 2010) (Trott, J., dissenting) (criticizing the "result-oriented notion" that the Bureau of Land Management's purpose and need statement is "narrowly drawn" as "utterly wrong"). In *National Parks*, the Ninth Circuit invalidated the Bureau of Land Management's (Bureau) NEPA analysis of a vitally important land exchange between the Bureau and Kaiser. The land exchange is necessary to address a " 'critical' landfill capacity shortfall in Southern California" and would lead to the development of "'one of the world's safest landfills and a model for others to emulate.' " *Id.* at 1079, 1099 (internal citations omitted).

The Ninth Circuit's decision, however, overturns decades of work on this project by Kaiser, local governments, and federal agencies. Under the Ninth Circuit's decision, NEPA has effectively become something much more than a procedural statute–the court in this case has forced the parties to "hit[] the reset button . . . unnecessarily sending [them] back to a Sisyphean hill which cannot be climbed in a lifetime." *Id.* at 1078. (Trott, J., dissenting).

Indeed, the "final irony" of the Ninth Circuit's decision is that the court has sent this case "back to the Bureau of Land Management . . . to do something [it] has already adequately done: consider the value of the land involved as a commercial landfill." *Id.* at 1075. (Trott, J., dissenting). The Ninth Circuit's decision warrants review because the court has unnecessarily remanded the case to the Bureau for further, but needless, consideration. *See* Petitioners Kaiser Eagle Mountain, Inc., and Mine Reclamation Corporation's Petition for Writ of Certiorari at 18.

The underlying problems on the merits of the *National Parks* decision, however, cannot be ignored. The Ninth Circuit determined that the Bureau's NEPA analysis was deficient because the agency's Environmental Impact Statement acknowledged the goals of Kaiser in proposing the land exchange to the Bureau. *See National Parks*, 606 F.3d at 1070-72 (majority opinion). But nothing in NEPA or its implementing regulations forecloses an agency from recognizing non-federal objectives in considering the purpose and need for the proposed action. *See* 42 U.S.C. § 4332(2)(C)(iii) (An Environmental Impact Statement must discuss "alternatives to the proposed action."), *and* 40 C.F.R. § 1502.13 (An Environmental

Impact Statement "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.").

To the contrary, such a consideration is required. As Judge Trott cogently noted in dissent, "[o]f course BLM acknowledged Kaiser's purpose – *the law requires BLM to do so*! For private, non-federal proposals, '[a]gencies . . . are precluded from completely ignoring a private applicant's objectives.'" *National Parks*, at 1079 (Trott, J. Dissenting) (brackets and ellipses in original dissent) (quoting *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999), and citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991)).

The Ninth Circuit's decision in *National Parks* also conflicts with D.C. Circuit and Tenth Circuit case law regarding how an agency must write a NEPA purpose and need statement "in a setting where a private entity approaches a government entity with a joint proposal that will benefit both." *National Parks*, 606 F.3d at 1078 (Trott, J. dissenting). *See Dombeck*, 185 F.3d at 1175 ("Agencies . . . are precluded from ignoring a private applicant's objectives.") (citing *Burlington*, 938 F.2d at 196). The Ninth Circuit has joined the Seventh Circuit in effectively precluding an agency from taking into account the "'means by which a particular applicant can reach his goals'" in pursuing a project requiring federal approval. *See Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 669 (7th Cir. 1997) (quoting *Van Abbema v. Fornell*, 807 F.2d 633, 636 (7th Cir. 1986) and contrasting *Burlington*, 938 F.2d at 198-99).

Given this conflict, the adverse ramifications the Ninth Circuit's decision will have in this case, and the uncertainty the decision will cause for cooperative projects between federal and non-federal parties throughout the country, this Court should grant Kaiser's petition.

I

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THIS CASE INVOLVES A CIRCUIT CONFLICT OVER AN IMPORTANT FEDERAL QUESTION ABOUT THE SCOPE OF NEPA IN DEFINING PROJECT OBJECTIVES

NEPA requires agencies to prepare Environmental Impact Statements for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An Environmental Impact Statement must include a discussion of "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii). Although "the term 'alternatives' is not self-defining," this Court has held that a "'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man," and that "[t]ime and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved." *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978). Moreover, the courts of appeals uniformly recognize "the harm that an unbounded understanding of alternatives might

cause." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991). *See also City of Carmel-By-The-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) ("The Environmental Impact Statement need not consider an infinite range of alternatives, only reasonable or feasible ones.") (citing 40 C.F.R. § 1502.14(a)-(C)).

Agencies are also obligated to "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives," but the courts disagree as to how an agency may ensure a finite range of alternatives to an agency action through a purpose and need statement. *See* 40 C.F.R. § 1502.13. There is indeed a "conflict of how to construe the stated project purpose under NEPA" when the impetus behind the project is the proposal of a non-federal applicant. *See* Jason J. Czarnezki, Comment, *Defining the Project Purpose under NEPA: Promoting Consideration of Viable EIS Alternatives*, 70 U. Colo. L. Rev. 599, 619 (2003).

The D.C. Circuit holds that an agency may "delimit the universe of the action's reasonable alternatives" by "consider[ing] an applicant's wants when the agency formulates the goals of its own proposed action." *Burlington*, 938 F.2d at 195, 199. The Tenth Circuit likewise holds that agencies "are precluded from completely ignoring a private applicant's objectives." *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999) (citing *Citizens Against Burlington*, 938 F.2d at 196). *See also Louisiana Wildlife Fed'n v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985) (*per curiam*) ("[The] contention, that the alternatives may not be viewed with the applicant's

objectives in mind, is not substantiated by either case law or the applicable regulations.").

However, an agency's consideration of a non-federal applicant's objectives in a NEPA purpose and need statement "is a losing position in the Seventh Circuit," which holds that an agency "cannot restrict its analysis to those 'alternative means by which a particular applicant can reach his goals.'" *Simmons*, 120 F.3d at 669 (quoting *Van Abbema*, 807 F.2d at 638 and contrasting *Burlington*, 938 F.2d at 198-99). According to the Seventh Circuit, consideration of non-federal objectives is foreclosed in a purpose and need statement because "the evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals." *Van Abbema*, 807 F.2d at 638.

The Ninth Circuit in this case joined the Seventh Circuit by prohibiting purpose and need statements that "exclude[] alternatives that fail to meet specific private objectives." *National Parks*, 606 F.3d at 1072. This rule of law is in direct conflict with then-Judge Thomas' admonition in *Burlington* that an agency's purpose and need statement is "shaped by the application at issue" and that "Congress did expect agencies to consider an applicant's wants when the agency formulates the goals of its own proposed action." *Burlington*, 938 F.2d at 199. The conflict over an agency's duty to consider the objectives of a non-federal applicant in a NEPA purpose and need statement is explained in greater detail below and warrants review by this Court.

A. Contrary to the Seventh and Ninth Circuits, the D.C. Circuit and Tenth Circuit Permit Agencies to Consider Non-federal Objectives in a Purpose and Need Statement

In *Burlington*, the D.C. Circuit considered whether the Federal Aviation Administration's (FAA) stated objectives for an airport expansion in Toledo were reasonable. *Burlington*, 938 F.2d at 193-99. The expansion plan involved the FAA, the Toledo-Lucas County Port Authority (Port Authority), and Burlington Air Express, Inc., a private company that intended to relocate to Toledo pending the Port Authority's accommodation of its operations. *Id.* at 192.

As an initial matter, the court concisely summarized the role agencies play in ensuring that environmental impact statements do not "wither into 'frivolous boilerplate' " by discussing a vast array of "[f]ree-floating 'alternatives' to the proposal for federal action." *Burlington*, 938 F.2d at 195 (quoting *Vermont Yankee*, 435 U.S. at 551). The court remarked that an alternative is reasonable and must be discussed "only if it will bring about the ends of the federal action." *Burlington*, 938 F.2d at 195. Thus, the goals of the federal action, as set forth in the purpose and need statement, "delimit the universe of the action's reasonable alternatives." *Id.*

The court next confirmed the primary role agencies have both in discussing the alternatives and defining the goals which limit the discussion of alternatives: "We have held before that an agency bears the responsibility for deciding which alternatives to consider in an environmental impact statement. . . .

It follows that an agency thus bears the responsibility for defining at the outset the objectives of an action." *Id.* at 195-96 (citations omitted). The court further explained that an agency's definition of objectives is to be upheld "so long as the objectives that the agency chooses are reasonable," just as courts uphold an agency's discussion of alternatives "so long as the alternatives are reasonable and the agency discusses them in reasonable detail." *Id.* at 196.

Under this deferential standard, "an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." *Id.* (citation omitted). But "[n]or may an agency frame its goals in terms so unreasonably broad that an infinite number of alternatives would accomplish those goals and the project would collapse under the weight of the possibilities." *Id.*

An agency ensures that its stated goal in a NEPA action is neither unreasonably narrow nor unreasonably broad by "look[ing] hard at the factors relevant to the definition of purpose." *Id.* In other words, "[w]hen an agency is asked to sanction a specific plan, the agency should take into account the needs and goals of the parties involved in the application," as well as the views of Congress as expressed in statutory mandates. *Id.* (citing 40 C.F.R. § 1508.18(b)(4); *Louisiana Wildlife Fed'n v. York*, 761 F.2d at 1048; and *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1046-47 (1st Cir. 1982)).

With these principles in mind, the D.C. Circuit upheld the FAA's purpose and need statement and

explained why it was appropriate to consider the interests of the Port Authority and Burlington Air Express, not simply those of the FAA. The court emphasized the agency's narrow statutory mandate, which is to "nurture aspiring cargo hubs," not to "determine the siting of the nation's airports." *Burlington*, 938 F.2d at 197 (citing 49 U.S.C. APP. § 2201(a)(7), (11)) (other citations omitted). Congress wanted the FAA to "facilitate the development of and enhancement of such airports," but left the precise manner of accomplishing this mandate to the discretion of the agency. *See id.* at 197 n.5 (quoting 49 U.S.C. APP. § 2201(a)). Thus, the FAA was entitled to look beyond its administrative capacity in defining the goals of the agency's action. The agency validly "took into account the Port Authority's reasons for wanting a cargo hub in Toledo," including the Authority's expectations that the cargo hub would create hundreds of full and part-time jobs and that "the expanded airport, and Burlington's presence there, [would] attract other companies to Toledo." *Burlington*, at 197-98.

Under its deferential approach to agency action under NEPA, the court upheld FAA's purpose and need statement: "Having thought hard about" the federal and non-federal factors put before the agency, "the FAA defined the goal for its action as helping to launch a new cargo hub in Toledo and thereby helping to fuel the Toledo economy," and "evaluated the environmental impacts of the only proposal that might reasonably accomplish that goal—approving the construction and operation of a cargo hub at Toledo Express. It did so with the thoroughness required by law." *Id.* at 198 (citation omitted).

Importantly, the court also rejected the argument that the FAA should have considered other ways in which Burlington Air Express could have built a permanent cargo hub, noting that "Congress did expect agencies to consider an applicant's wants when the agency formulates the goals of its own proposed action. Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be." *Id.* at 199. The FAA was not required to "canvass the business choices that Burlington faced when it considered leaving Fort Wayne" because federal agencies have "neither the expertise nor the proper incentive structure to do so (it has no shareholders who would suffer from mistaken judgments)." *Id.* at 197 n.6.

Indeed, the court was not permitted to excise the agency's consideration of the Port Authority's and Burlington's needs: "We are forbidden from taking sides in the debate over the merits of developing the Toledo Express Airport; we are required instead only to confirm that the FAA has fulfilled its statutory obligations. . . . All that this court decides today is that the judgment was not uninformed." *Id.* at 199 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989)).

The Tenth Circuit followed the D.C. Circuit in *Dombeck*, holding that "agencies . . . are precluded from completely ignoring a private applicant's goals." *Dombeck*, 185 F.3d at 1175 (citing *Burlington*, 938 F.2d at 196). In *Dombeck*, Vail, a private company, proposed to expand its existing ski area into a part of the White River National Forest known as Category III. *See Dombeck*, 185 F.3d at 1165-66. Pursuant to its authority over national forests, the Forest Service

approved Vail's site-specific plan and completed a NEPA review of the proposed expansion's environmental impacts. *See id.* at 1166. However, after the NEPA review was completed, one individual and various groups sued the Forest Service, claiming that the agency "blindly adopted Vail's articulated purpose and need" for the expansion project. *Id.* at 1175.

The Tenth Circuit rejected the plaintiffs' claim, holding that agencies are required to "take responsibility for defining the objectives of an action and then provide legitimate consideration to alternatives that fall between the obvious extremes." *Id.* Under this deferential approach, the Forest Service was well within its discretion to consider "the White River Forest Plan, prior Forest Service planning and permitting decisions in accordance with the National Forest Ski Area Permit Act of 1986, *and Vail's expressed needs and goals*, when drafting the statement of purpose and need for the Category III expansion environmental impact statement." *Id.* (emphasis added).

Thus, the rule in *Burlington* and *Dombeck* is that, where a project involves private parties, federal agencies are not only permitted but required to consider a mix of public and private goals in a purpose and need statement. Because NEPA "does not substantively constrain an agency's choice of objectives; to the contrary, it is those very objectives that provide the point of reference for a determination whether an alternative is 'reasonable' in the first place." *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999). These decisions provide agencies with a necessary means to " 'delimit the universe of the

action's reasonable alternatives'" and are in line with a court's obligation to review "whether an agency's objectives are reasonable, and whether a particular alternative is reasonable in light of these objectives . . . with considerable deference to the agency's expertise and policy-making role." *Id.*

B. Contrary to the D.C. and Tenth Circuits, the Ninth Circuit Joined the Seventh Circuit in Erroneously Removing the Discretion of Federal Agencies To Consider a Mix of Federal and Non-federal Goals in a Purpose and Need Statement

The Ninth Circuit in this case was satisfied that the Bureau's purpose and need statement included an "unquestionably . . . valid BLM purpose": the need to meet long-term landfill demand. *National Parks*, 606 F.3d at 1071. It likewise noted that "[o]ther circuits have held that agencies must acknowledge private goals." *Id.* at 1070 (citing *Burlington*, 938 F.2d at 196, and *Dombeck*, 185 F.3d at 1175). However, in a sharp contrast to *Burlington* and *Dombeck*'s approval of an agency's consideration of non-federal objectives, the court then proceeded to chide the Bureau for honestly acknowledging that Kaiser has an interest in the land exchange as well. *National Parks*, 606 F.3d at 1072. The court took the agency to task for "requir[ing] that Kaiser's private needs be met" and excluding alternatives that failed to meet Kaiser's private objectives. *Id.*

That is wrong. An agency's purpose and need statement cannot be invalid simply because it considered public and private objectives and then "define[d] goals for its action that fall somewhere

within the range of reasonable choices," as the Bureau did in this case. *See Burlington*, 938 F.2d at 196. This is especially so given the ramifications to an agency if it does not disclose private, non-federal objectives. As Judge Trott observed: "[o]f course there is a private purpose driving this project. But the project benefits *both* parties, not just Kaiser. To isolate one without factoring in the other is patently illogical." *National Parks*, 606 F.3d at 1078 (Trott, J., dissenting).

The majority in *National Parks* also expressed concern that most of the alternatives considered by BLM would result in Kaiser acquiring federal land. *See National Parks*, 606 F.3d at 1072 (majority opinion) (listing alternatives and observing that "[a]ll of these options, save the No Action alternative, would result in landfill development of some sort and would require some portion of the land exchange to occur"). It ruled that BLM arbitrarily excluded the consideration of a landfill on other Kaiser property. *See id.*

The majority opinion, however, conflicts with *Burlington* because agencies are not required to "canvass the business choices" faced by a private entity that has chosen to pursue a project. *Burlington*, 938 F.2d at 197 n.7. If this view applied in the D.C. Circuit, the FAA in *Burlington* would have been required to analyze the alternative of Burlington Air Express building a cargo hub somewhere else besides Toledo. But this view was explicitly rejected by the D.C. Circuit in *Burlington*. *See id.* at 198-99.

In addition, while the Bureau considered six alternatives in *National Parks* compared to FAA's consideration of only two alternatives in *Burlington*, the majority chastised the agency for failing to

consider "several alternatives that would have been responsive to the need to meet long-term landfill demand, such as a landfill on other Kaiser property, waste diversion, offsite landfill locations, landfill mining, alternative Townsite locations, and alternative Townsite uses." *National Parks*, 606 F.3d at 1072. The court's list of alternatives, however, has no discernable limit and contradicts *Burlington*'s holding that agencies may include "goals of an action [that] delimit the universe of the action's reasonable alternatives." *Burlington*, 938 F.2d at 195. *See also City of Alexandria*, 198 F.3d at 867 ("[A]n alternative is properly excluded from consideration in an environmental impact statement only if it would be reasonable for the agency to conclude that the alternative does not 'bring about the ends of the federal action.'") (quoting *Burlington*, 938 F.2d at 195).

Indeed, the Ninth Circuit impermissibly focused on the general goal "to meet long-term landfill demand," *National Parks*, 606 F.3d at 1071, divorced from "the application at issue" and "the goals of the applicant's proposal." *Burlington*, 938 F.2d at 199.[2]

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[2] The Ninth Circuit's decision prohibiting agencies from "exclud[ing] alternatives that fail to meet specific private objectives," *National Parks*, 606 F.3d at 1072, is a departure from its prior recognition that an agency's purpose and need statement may address a a non-federal applicant's needs. *See City of Angoon v. Hodel*, 803 F.2d 1016, 1021-22 (9th Cir. 1986) (*per curiam*) (holding that to preclude an agency from considering a non-federal applicant's needs "is to visit upon it a task that would involve almost endless speculation). The majority in *National Parks* attempted to distinguish *Angoon*, noting that the issue in *Angoon* "was whether the Corps should issue a permit," as opposed to land exchange at issue in *National Parks*. *National Parks* 606 F.3d at 1071. But the Ninth Circuit's analysis in *Angoon* was actually (continued...)

This is the functional equivalent of the rule in the Seventh Circuit that "the evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals." *Van Abbema*, 807 F.2d at 638.

The *Van Abbema* rule requires courts to invalidate purpose and need statements which contain private, non-federal objectives and allow agencies to consider alternatives which reflect a mix of public and private goals. Thus, the Seventh Circuit in *Simmons* invalidated a purpose and need statement because it did not articulate the general goal of water supply for Illinois residents and instead referenced the *specific* goal of a single reservoir for two localities—the single reservoir had been proposed to the Army Corps of Engineers by non-federal applicants as the means by which to accomplish the general goal of water supply for the residents. *See Simmons*, 120 F.3d at 667. Following *Van Abbema*, the court in *Simmons* forced the Corps to consider two or more sources of water instead of a single reservoir, holding that an agency "cannot restrict its analysis to those 'alternative means by which a particular applicant can reach his goals.'" *Id.* at 669 (quoting *Van Abbema*, 807 F.2d at 638 and contrasting *Burlington*, 938 F.2d at 198-99). *See also Hoosier Environmental Council, Inc. v. U.S. Army Corps of Engineers*, 105 F. Supp. 2d 953, 1000 n.23 (S.D. Ind. 2000) ("In [*Simmons*], the court noted

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[2] (...continued)
based on the Corps' purpose and need statement and not on the fact that the validity of a permit was ultimately at issue. *See Angon*, 803 F.3d at 1021.

[*Burlington's*] disagreement with its interpretation of the proper scope of relevant alternatives, but continued to apply the *Van Abbema* formulation."). *Compare National Parks*, 606 F.3d at 1072 ("The BLM may not . . . adopt[] private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives.") *with Simmons*, 120 F.3d at 669.

But the *Van Abbema* rule is not followed in the D.C. Circuit or Tenth Circuit because it is premised on "critical flaws." *See Burlington*, 938 F.2d at 199. *See also Dombeck*, 185 F.3d at 1174 (declining plaintiffs' request to adopt *Van Abbema* rule).

Van Abbema's "assertion that an agency must evaluate 'alternative means to accomplish the general goal of an action'" likewise "trouble[d]" the D.C. Circuit in *Burlington*. *Burlington*, at 199 (quoting *Van Abbema*, 807 F.2d at 638). As the D.C. Circuit noted,

> [l]eft unanswered in *Van Abbema* . . . is why and how to distinguish general goals from specific ones and just who does the distinguishing. *Someone* has to define the purpose of the agency action. Implicit in *Van Abbema* is that the body responsible is the reviewing court . . . . [H]owever, NEPA and binding case law provide otherwise.

Burlington, 938 F.2d at 199.

In this case, the Bureau defined the purpose of the land exchange in a manner that reflected a mix of public and private goals, similar to the purpose and need statements in *Burlington* and *Dombeck*. *See National Parks*, 606 F.3d at 1071 (discussing four goals

in Bureau's purpose and need statement).[3] Yet the Ninth Circuit rejected the deferential approach to agency decision-making under NEPA in favor of a standard which limits agencies to consideration of only general goals. This "general goals" standard is an ambiguous concept that forecloses an agency's ability to respond to a proposal that "arouses the call for action" and thereby establishes goals which "delimit the universe of the action's reasonable alternatives." *Burlington*, 938 F.2d at 195, 199. It also stands in sharp contrast to the Council on Environmental Quality's own guidance regarding NEPA regulations. *See* 48 Fed. Reg. 34,263, 34,267 (July 28, 1983) ("There is . . . no need to disregard the applicant's purposes and needs and common sense realities of a given situation in the development of alternatives.").

More importantly, *National Parks* conflicts with D.C. Circuit and Tenth Circuit precedent, leaves public and private parties uncertain "in a setting where a private entity approaches a governmental entity with a joint proposal that will benefit both," and should accordingly be reviewed by this Court. *See National Parks*, 606 F.3d at 1078 (Trott, J., dissenting).

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[3] The majority's mischaracterization of securing a "long-term income source" provided by the landfill as a private objective instead of a public goal underscores its failure to abide by the deferential role courts play in reviewing NEPA purpose and need statements. *See* Petitioners Kaiser Eagle Mountain, Inc., and Mine Reclamation Corporation's Petition for Writ of Certiorari at 27

II

THE ENDLESS ADMINISTRATIVE AND JUDICIAL HURDLES CREATED BY THE NINTH CIRCUIT'S DECISION ARE IMPORTANT TO FEDERAL AND NON-FEDERAL PARTIES THROUGHOUT THE COUNTRY AND WARRANT REVIEW

The Ninth Circuit halted a landfill project that would have addressed "a 'critical' landfill capacity shortfall in Southern California. *National Parks*, 606 F.3d at 1079 (Trott, J., dissenting) (citing administrative record). But Kaiser's project would not only have benefitted Californian residents–the landfill would also have been the first to comply with new Environmental Protection Agency guidelines and could have become "'one of the world's safest landfills and a model for others to emulate.'" *Id.* at 1075, 1077-78 (quoting Technical Advisory Panel composed of eminent scientists and engineers from major California Universities) (emphasis in dissent omitted). In addition, the land given up by Kaiser under the land exchange would have enhanced contiguous federal land in Southern California that protects endangered and threatened species. *See id.* at 1082-84 (citing administrative record).

Despite Kaiser's cooperation with state and federal agencies for nearly two decades in order to achieve these laudable goals, the project's status remains uncertain. *See* Petitioners Kaiser Eagle Mountain, Inc., and Mine Reclamation Corporation's Petition for Writ of Certiorari at 32-35. The Ninth Circuit has remanded the case to the Bureau "to do something BLM has already adequately done: consider the value of the land involved as a commercial

landfill," sending the parties "back to a Sisyphean hill which cannot be climbed in a lifetime," *National Parks*, 606 F.3d at 1075, 1078 (Trott, J., dissenting). The delay in this case has already cost Kaiser millions of dollars and speaks ill of the administrative and judicial processes. *See id.* at 1076 (noting that Kaiser's "vain attempt to accomplish its goals" has cost it more than $50,000,000). As Judge Trott asked, "[h]ow many of the people who started this project are still employed by Kaiser, are still in public service, or for that matter, are still alive? Yet, the *process* has developed an eternal life of its own as full-employment for all swept along with or by it." *Id.* at 1078.

The significance of leaving the panel majority's opinion in place is best summarized in the opening lines of Judge Trott's dissent: "What sane person would want to attempt to acquire property for a landfill? Our well-meaning environmental laws have unintentionally made such an endeavor a fool's errand." *National Parks*, 606 F.3d at 1075 (Trott, J., dissenting).

Judge Trott's points are appropriate and relevant to Kaiser and all private entities that wish to work cooperatively with federal agencies. *Cf. id.* at 1082 ("Of course Kaiser has its own goals it hopes to accomplish from this project, and of course it hopes to make profit, but it seems blindingly apparent that its goals dovetail with the public's need for a landfill.") Navigating through the administrative state is difficult enough, especially when the voyage is fraught with the uncertain specter of litigation. At a certain point, however, the hurdles become too burdensome and a company will choose to go no further in the pursuit of a public objective. This Court's review of *National*

Parks is, therefore, necessary to ensure that the Ninth Circuit's decision does not lead to this disturbing consequence for projects throughout the country.

CONCLUSION

Review of *National Parks* is warranted because (in addition to the Seventh Circuit) the Ninth Circuit's decision conflicts with decisions from the D.C. Circuit and Tenth Circuit and leaves federal and non-federal parties uncertain in circumstances "where a private entity approaches a government entity with a joint proposal that will benefit both." *Id.* at 1078. If allowed to stand, *National Parks* is likely to lead regulated entities to grow "weary . . . and throw in the towel, thwarted and defeated not by substance, but by interminable process." *Id.* This is contrary to the public interest.

For these reasons, Amicus Pacific Legal Foundation urges this Court to grant the petition for a writ of certiorari.

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Respectfully submitted,

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